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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 745

ABRAHAM MOSKOW et al

v.

BOSTON REDEVELOPMENT AUTHORITY et al

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

JAMES W. KELLEHER
Counsel for Petitioners
73 Tremont St.
Boston, Mass.

Of Counsel:
WILLIAM C. MADDEN
EDGAR L. KELLEY

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Judicial Court of Massachusetts entered in the above-entitled case on August 17, 1965.*

---

*The petitioners are Abraham Moskow, Jay I. Moskow, Harry Moskow and Myer Moskow. Respondents are Boston Redevelopment Authority; Christopher Iannella, George F. Foley, William J. Foley, Frederick C. Langone, John J. Tierney, Jr., Barry Hynes, John E. Kerrigan, Peter F. Hines, and Katherine Craven, as they are members and constitute the City Council of Boston; The Division of Urban and Industrial Renewal, John J. Carney, as he is the Temporary Director of the Division of Urban and Industrial Renewal; the City of Boston; New England Merchants Bank of Boston, and Andrew A. Hunter.

Citations to Opinions Below

No opinion was rendered by the Superior Court of Massachusetts in this case. The majority opinion of the Supreme Judicial Court of Massachusetts, written by Wilkins, C.J., and the minority opinion written by Kirk, J., are printed in Appendix A hereto, infra pp. 13, 31, and are reported in Mass. Adv. Sh. (1965) 1203, 1220.

Jurisdiction

The judgment of the Supreme Judicial Court was entered on August 17, 1965. Record, page following printed record. There is no formal provision for rehearing in that court. Informal application for rehearing was made on August 30, 1965, by letter addressed to Chief Justice Wilkins (infra, Appendix C, p. 40) and was denied on October 4, 1965 (infra, Appendix C, p. 43).

The jurisdiction of this Court is invoked under 28 U.S.C. s. 1257 (3) since said judgment of the Supreme Judicial Court was entered without the notice and opportunity to be heard to which petitioners are entitled by the due process clause of the Fourteenth Amendment to the United States Constitution, and deprives them of property in violation of said clause.

Question Presented

It is settled Massachusetts law that a demurrer to a bill for declaratory relief must be overruled if the bill states a justiciable controversy; it is immaterial on demurrer that the declaration, when ultimately entered, may be against the plaintiff's contention. Rule 28 of the Superior Court provides that a respondent may, by leave of court, demur without answering, in which case he must file an

answer within ten days after the demurrer is overruled. Here the bill asked for a declaratory judgment that a taking of plaintiffs' land was invalid. Respondents, by leave of court, demurred without answering, on the ground that the bill stated no justiciable controversy. The Superior Court sustained the demurrers and dismissed the bill. Plaintiffs appealed to the Supreme Judicial Court. The question presented is

> May the Supreme Judicial Court, after reversing the Superior Court and overruling the demurrers, simultaneously and without further notice or hearing enter a judgment declaring the taking valid, without violating the due process clause of the Fourteenth Amendment to the United States Constitution?

Constitutional Provision Statute and Rules Involved

The United States Constitution, Amendment XIV, s. 1 provides ". . . nor shall any State deprive any person of . . . property, without due process of law; . . . ."

The Massachusetts declaratory judgment statute is found in Mass. G. L. c. 231A, and is printed in Appendix B, infra, pp. 36-38. Rule 28 of the Superior Court of Massachusetts relating to demurrers, pleas and answers in equity, provides in material part as follows:

> "The court may give leave ex parte to a defendant to file a demurrer or plea, reserving his answer. In the absence of such leave, the defendant must (a) file at the same time his demurrer, plea and answer, or such of them as he may desire ,and shall have no right without leave of court to file another of such pleadings after filing any one of them, or (b) include in

his answer any special matter by way of demurrer and plea, or either of them, describing such matter clearly as by way of demurrer or plea as the case may be, in which case and not otherwise he shall have the same benefit therefrom as if he had pleaded the same or demurred to the bill.

"If a plea or demurrer shall be filed, with leave to reserve the answer, and the plea or demurrer shall be overruled or disproved, no other plea or demurrer shall be received without leave of court, but the defendant shall within ten days answer the bill."

Rule 15 of the Supreme Judicial Court Rules for the Regulation of Practice before the Full Court, provides in part as follows:

"(A) A brief shall contain in the order here indicated

. . . . . .

(5) A conclusion specifying with particularity the relief to which the party claims to be entitled."

Statement

In this proceeding, commenced by bill in equity in the Superior Court of Massachusetts, (PR 1-11), pursuant to Mass. G.L. c. 231A (Appendix B, infra, pp. 36-38) the petitioners (hereinafter called the Moskows) sought a declaration that the taking of their land and building at 10 State Street, Boston, by the defendant Boston Redevelopment Authority was void (PR 10). The basic allegation is that the taking was not for a public purpose, but was for the purpose of providing new quarters for the defendant New

England Merchants National Bank of Boston, pursuant to a scheme agreed upon by the Bank, the Revelopment Authority, and Cabot, Cabot and Forbes, a private developer selected by the Bank to construct a new building at 10 State Street. (Bill, par. 6; PR 2-4) Further allegations of the bill attacked the action of the defendant City Council of Boston (Bill, par. 8-19; PR 5-8) and of the Division of Urban Renewal (Bill, par. 20-21; PR 9) in approving the inclusion of plaintiffs' land in the redevelopment plan, and the activities of the defendant Hunter, a director of the Bank, who was alleged to have raised a campaign fund for certain members of the council on the basis that they would, if elected, vote for the redevelopment plan.* (Bill, par. 10, 11, 14, 18; PR 6-8).

Each of the defendants demurred to the bill. (Printed Record 11-12, 14, 16-17, 18-19, 21). No answers were filed. Defendants Boston Redevelopment Authority, City of Boston, City Council of Boston, New England Merchants National Bank and Hunter obtained leave under Rule 28 of the Superior Court to demur without answering, which gave them the right to answer within ten days after the demurrers were overruled. Docket, Items 3, 4, 6, 8.

The Superior Court, after hearing, entered interlocutory decrees sustaining the demurrers (PR 13, 14, 17, 20, 21), and a final decree dismissing the bill. (PR 23). Plaintiffs duly appealed to the Supreme Judicial Court from these decrees. (PR 13, 15, 18, 20, 22, 23).

All parties duly filed briefs in the Supreme Judicial Court. Each such brief complied with Rule 15 (A) (5) governing practice before the full court, in that it contained

*This case was heard with four others, which were proceedings attempting to obtain judicial review of, or otherwise attacking, various steps taken in adopting the redevelopment plan. These four cases were finally disposed of in the opinion of the Supreme Judicial Court here in question. Mass. Adv. Sh. (1965) 1203, 1218-1220; App. A, pp. 29-31. Petitioners claim no error with respect to those judgments.

a "conclusion" stating with particularity the relief requested. Those "conclusions" are set forth in Appendix D, hereto, pp. 44-46). Petitioners, who were appellants, asked the Supreme Judicial Court to reverse the decrees appealed from and remand the case for further proceedings. App. D, p. 44. Each respondent asked that the decrees be affirmed. App. D, pp. 44-46. No one asked that a declaratory judgment be entered.

The Supreme Judicial Court handed down its opinion on August 17, 1965, with Kirk and Spiegel, JJ., dissenting. Those opinions are printed in Appendix A, pp. 13, 31, infra. The Court held that the demurrers of defendants New England Merchants National Bank and Andrew A. Hunter were properly sustained, on the ground that the bill stated no controversy as to them. App. A, p. 29. The court disposed of the remainder of the case as follows:

> ". . . On the demurrers of the other defendants it would have been better practice to overrule the demurrers and enter a negative declaration. See *Foley* v. *Springfield,* 328 Mass. 59, 62-63; *Vasilakis* v. *Haverhlil,* 339 Mass. 97, 101; *School Comm. of New Bedford* v. *Commissioner of Educ.* . . . (Mass. Adv. Sh. (1965) 1029, 1030-1031.)
>
> "7. Let the entries be made: . . . As to the other defendants the interlocutory and final decrees are reversed and a declaration is made that the taking of the plaintiffs' property by the Authority was not illegal and was not a nullity." (Mass. Adv. Sh. (1965) 1203, 1218; App. A, p. 29)

In paragraph 7 of the bill (PR 5) the petitioners claimed, under the Fourteenth Amendment to the Constitution of the United States, a full and fair hearing on the question whether the taking of their land was for a public purpose.

There is no provision for rehearing by the Supreme Judicial Court. By custom one may informally call an error to the attention of the Court. *Powers* v. *Sturtevant*, 200 Mass. 519, 520-521. Counsel for petitioner so acted in this case by writing to Chief Justice Wilkins on August 30, 1965, and sending copies to counsel for the other parties. See Appendix C, hereto. pp. 40-42. That letter, after requesting a rehearing as to the binding declaration contained in the opinion (App. C, p. 40), concluded as follows (App. C, pp. 41-42):

> "In order to protect the rights of plaintiffs I am bound to state further to the Court that the entry of a binding declaration on the present record deprives the plaintiffs of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, in that they have never had the opportunity to establish the relevant facts by introducing evidence, nor the opportunity to be heard as to the proper declaration to be entered after the facts are established. Upon this point I respectfully refer the Court to the opinion of Mr. Justice Holmes in *Saunders* v. *Shaw*, 244 U.S. 317, 320:
>
> > ". . . But when the act complained of is the act of the Supreme Court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here. The defendant was not bound to contemplate a decision of the case before his evidence was heard and therefore was not bound to ask a ruling or to take other precautions in advance. The denial of rights

given by the Fourteenth Amendment need not be by legislation. *Home Telephone & Telegraph Co.* v. *Los Angeles,* 227 U.S. 278 . . ."

The petitioners' request for rehearing was denied by the Court by letter of October 4, 1965 (App. C, p. 43). Neither letter is a part of the record of the Court.

Reasons for Granting the Writ

"The fundamental requisite of due process of law is the opportunity to be heard." *Grannis* v. *Ordean,* 234 U.S. 385, 394. Petitioners were denied this opportunity with respect to the binding declaration entered against them by the Supreme Judicial Court. That declaration was a summary judgment entered with no lawful basis, for Massachusetts has but a limited summary judgment statute clearly not applicable here. Cf. Mass. G. L. c. 231, ss. 59, 59B.

The decisive question is this: When counsel for petitioners briefed and argued this case on appeal, had he any notice that one question before the court was the entry of a final declaration?

Consider the matter first from the viewpoint of counsel for respondents Boston Redevelopment Authority (which took the land in question), City of Boston, Boston City Council, New England Merchants National Bank and Hunter. It was clear beyond dispute when these respondents briefed and argued that the Supreme Judicial Court could enter no binding declaration *against them,* for they had by express leave of court the right to answer and traverse the facts in the bill should the demurrer be overruled. Docket Items 3, 4, 6, 8. If the Supreme Judicial Court had overruled the demurrers and entered a declaration that the taking was valid, that declaration would

have deprived these respondents of their right to answer, in violation of the due process clause. *Hovey* v. *Elliott*, 167 U.S. 409. Clearly, then, the hearing on demurrer did not call upon the respondents to brief and argue the question *what* declaration should be entered. Nor did they do so. The "conclusion" of each respondent's brief, which by Rule 15 (A)(5) of the Supreme Judicial Court is required to set forth with particularity the relief requested, asks merely that the decrees sustaining the demurrers be affirmed. No respondent asked that a declaration be entered. App. D, infra, pp. 44-46.

Nor did counsel for petitioners ask that a declaration be entered; he asked simply that the decrees sustaining the demurrers be reversed and the case be remanded for further proceedings. App. D, p. 44. Was he called upon, at a hearing on demurrer, to argue the question *what* declaration should enter, to argue a question upon which the Fourteenth Amendment forbade a decision in his favor?

Nothing in the previous decisions of the Supreme Judicial Court put the petitioners on notice that a binding declaration might be entered against them. The decisions cited by the Supreme Judicial Court in its opinion support the position we now urge. In two of those cases, in which the Supreme Judicial Court on appeal held that demurrers should be overruled and a declaratory judgment entered, the facts had been established either by agreement (*Foley* v. *Springfield*, 328 Mass. 59, 62-63) or by trial in the Superior Court. *Vasilakis* v. *Haverhill*, 339 Mass. 97, 101. In the third case, which in its procedural aspects exactly resembles the case at bar, the Supreme Judicial Court, after holding that the demurrer should have been overruled, went on as follows:

> "It may be that the bill states with substantial accuracy the relevant facts. That however, cannot be

> determined in advance of the filing of the defendants' answers and trial on the merits. Thus we do not afford declaratory relief finally on this record . . ." *School Committee of New Bedford* v. *Commissioner of Education,* Mass. Adv. Sh. (1965) 1029, 1031.

The Supreme Judicial Court has repeatedly stated that the following rule is applicable on demurrer to a bill for declaratory relief:

> ". . . Ordinarily a demurrer cannot properly be sustained to a bill for a declaratory decree on the ground that the court does not agree with the proposition for which the plaintiff contends. Usually a declaratory decree should be made in any event." *County of Dukes County* v. *New Bedford etc. S.S. Authority,* 333 Mass. 405, 406.

We observe, however that no decision says or holds that the declaratory decree should be entered *summarily* upon the overruling of the demurrer, prior to any determination of fact binding on both parties. The true meaning of the rule is that a demurrer raises only the question *whether any,* not the question *what,* declaration should be entered. The question *"what"* is *immaterial* on demurrer; it is left for later disposition, both as to questions of law and questions of fact, if the demurrer be overruled. And if the demurrer be sustained there is clearly, under Massachusetts practice, no judgment on the merits.

Respondents may cite *Willcutt* v. *Prescott,* 340 Mass. 532, and *Trustees of Reservations* v. *Stockbridge,* Mass. Adv. Sh. (1965) 265, in each of which cases the Supreme Judicial Court on appeal ordered demurrers overruled and declarations entered against the plaintiffs. The court in each

case categorically stated, what it could not and did not state in the opinion in this case, that "There are no facts in dispute . . ." 340 Mass. 532, 535; Mass. Adv. Sh. (1965) 265, 267. It is significant, we think, that the plaintiff in each case, in the "conclusion" to his brief, asks that the court enter a declaratory judgment. (App. E, infra, p. 47) Volenti non fit injuria. A constitutional right may be waived.

Nothing in the present posture of this case involves in any way what was decided by this Court in *Berman* v. *Parker,* 348 U.S. 26. Yet as that case has been and may again be cited by respondents, a comparison between the *procedure* followed in *Berman* and that followed here is useful. In *Berman* the plaintiffs filed a petition somewhat like the bill in this case. The respondent, before filing an answer, moved to dismiss, or, in the alternative, for summary judgment, the motion being supported by affidavits. Berman Tr. 8-44. The plaintiff then filed a cross-motion for summary judgment in which he stated that there was no dispute as to any material fact. Berman Tr. 45. Thus the facts were established upon which the three-judge district court, and this Court upon appeal, might properly enter a declaratory judgment. And the parties were bound to know, in arguing the case before each court, that the question presented was "what declaration shall be made?" The *Berman case* thus differs in a vital respect from the case at bar.

As we have seen above the parties to this case were bound only to consider the question *whether* declaratory relief could be given. They were fully entitled to treat the question "*what* relief?" as immaterial to the appeal. They *did* treat it as immaterial. The declaratory judgment in this case was entered without notice and opportunity

to be heard in violation of the due process clause of the Fourteenth Amendment.

Saunders v. *Shaw,* 244 U. S. 317.
Reynolds v. *Stockton,* 140 U. S. 254, 265-266.
Hovey v. *Elliott,* 167 U. S. 409, 414, 445-446.

The petitioners were completely taken by surprise by the decision of August 17, 1965, and have claimed their federal question at the first possible opportunity, by informal request for rehearing by the Supreme Judicial Court on August 30, 1965, and by asserting it in this petition. *Saunders* v. *Shaw,* 244 U. S. 317, 320.

This case raises an important and undecided constitutional question in the heavily litigated field of declaratory judgments. The dissenting opinion of the Supreme Judicial Court (App. A, pp. 31-35) indicates, we think, that petitioners have a substantial case to urge upon the Massachusetts courts when they are given the opportunity to be heard.

Conclusion

For the foregoing reasons we ask that the court grant this petition for a writ of certiorari.

Respectfully submitted,

JAMES W. KELLEHER
Counsel for Petitioners

Of Counsel:
WILLIAM C. MADDEN
EDGAR L. KELLEY

Appendix A

OPINION OF THE SUPREME JUDICIAL COURT

S-6624
S-13,348
S-13,349
S-6622
S-6623

ABRAHAM MOSKOW & Others[1]

vs.

BOSTON REDEVELOPMENT AUTHORITY & Others
(and four companion cases).[2]

WILKINS, C. J. THE PRINCIPAL BILL FOR DECLARATORY RELIEF.

The plaintiffs own as tenants in common a parcel of land with an office building at 10 State Street, Boston, title to which they acquired on July 23, 1964, from State Street Corporation (State Street), a corporation of Massachusetts, of which they were the sole stockholders, and which on that date they voted to liquidate and dissolve. Also on that date, shortly after the deed to the plaintiffs was recorded, the defendant Boston Redevelopment Authority, a body corporate and politic established under G. L. c. 121, § 26QQ (as amended by St. 1957, c. 150, § 1) and given powers and duties unique for a redevelopment authority by St. 1960, c. 652, §§ 12-14, voted to take the property. The plaintiffs contend the taking to be invalid and bring

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[1] Jay I. Moskow, Harry Moskow, and Myer Moskow.

[2] The companion cases are all by State Street Corporation: No. 13,348, certiorari against City Council of Boston; No. 13,349, certiorari against John J. Carney, temporary Director of Division of Urban and Industrial Renewal, and Boston Redevelopment Authority; No. 6622, bill in equity against City Council of Boston, Boston Redevelopment Authority, New England Merchants National Bank of Boston, and Andrew A. Hunter; and No. 6623, petition for review under G. L. c. 30A, § 14, against the Division of Urban and Industrial Renewal.

this bill in equity pursuant to G. L. c. 231A for a declaratory decree and for injunctive relief.[3] The controversy alleged is between the plaintiffs and the Authority. The defendants city of Boston, the city council, the Division of Urban and Industrial Renewal,[4] and John J. Carney, its "temporary" director, are made defendants allegedly because of G. L. c. 231A, § 8. Also made defendants are New England Merchants National Bank of Boston, having a usual place of business at 28 State Street, and Andrew A. Hunter "because of their interest in the proceedings." All the defendants filed demurrers. These were five in number: (1) by the Authority; (2) by the city and the city council; (3) by the Division and Carney; (4) by the bank; (5) by Hunter.

The plaintiffs appealed from interlocutory decrees sustaining the demurrers and from a final decree dismissing the bill.

We summarize the factual allegations of the bill. The primary purpose of the taking was not the public interest but was to provide a site for a new private office building to be occupied by the bank. The taking was made ostensibly in connection with a redevelopment project of the Authority, known as the Government Center Project (the Project), under the powers conferred by G. L. c. 121. Neither the property at 28 State Street nor that at 10 State Street was within a decadent, substandard, or blighted open area within the meaning of c. 121, and the Authority had no power to take those properties on the ground that they were

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[3] Case No. 6624.

[4] As of August 6, 1964, the name of the Division was changed to the Division of Urban Renewal, and the Division was placed in the Department of Commerce and Development of the Commonwealth. G. L. c. 121, § 26J, as amended by St. 1964, c. 636, § 6. Previously the name of the Division was the Division of Urban and Industrial Renewal, and the Division was located in the Department of Public Welfare. See St. 1960, c. 776, §§ 1, 2.

within such areas. The Authority, however, proposed to widen and reconstruct Congress Street on which the bank's building bounded, so as to facilitate access to the Project and to take the bank's property for that purpose. The bank, which had had its principal office on State Street for many years, vigorously protested this proposal on various grounds, among them, that its property was not within a decadent, substandard, or blighted area, and that it was not necessary to take its property to widen Congress Street. After negotiations among representatives of the bank, of the Authority, and of Cabot, Cabot & Forbes Company (Cabot), a developer selected by the bank, an understanding was reached that the bank would withdraw its objections and would endeavor to purchase the property at 10 State Street from State Street; that if the bank should be able to make the purchase, it would cause the existing building at 10 State Street to be demolished and the land to be conveyed to Cabot, which would erect upon the site a new tower building of a design and specifications approved by the bank and the Authority, and would lease the first ten floors to the bank; that in that case the bank would sell its property at 28 State Street to the Authority at the fair value, retaining the right to possession until the new building should be completed and ready for occupancy; that if the bank should be unable to purchase the property at 10 State Street upon acceptable terms, the Authority would include both that and the bank's property in the area which it proposed to take for the Project, and would dispose of it to Cabot upon terms satisfactory to Cabot; that Cabot would then proceed to construct the new tower building to be occupied by the bank; but that until the new building should be ready for occupancy, the bank and its tenants might continue to occupy the premises at 28 State Street. The purpose of the understanding was to "coerce" State Street to sell its property to the bank so that the

latter might continue to maintain its principal offices on State Street. To effect that purpose, the administrator of the Authority "threatened" the officers of State Street that unless it sold to the bank, he would cause it to be included in the urban renewal plan for the Project, and to be taken by the Authority by eminent domain.

State Street was unwilling to sell to the bank at the price which the bank offered. Accordingly, the administrator of the Authority, pursuant to the understanding set forth above, caused an Urban Renewal Plan to be prepared which included both the property of the bank and that of State Street. These properties were designated on the Plan as Parcel 8, and the specifications of land uses required that a tower building conforming generally to the specifications previously approved by the bank, the Authority, and Cabot be erected thereon. On April 2, 1963, the Authority gave notice of a hearing upon the proposed plan to be held on April 17, 1963. On June 5, 1963, the Authority voted to approve the Plan.

The Authority first submitted the Plan to the city council for approval in June, 1963. On July 22, 1963, after a public hearing at which State Street appeared by counsel, the Committee on Urban Redevelopment, Rehabilitation, and Renewal of the city council reported that a majority of the committee were in favor of the Project with the boundaries which had been earlier defined, but were opposed to the inclusion of Parcel 8. Thereupon the council rejected the Plan by a vote of five to four. On July 29, 1963, the council again voted to reject the Plan.

During August, September, and October, 1963, the mayor and others, including a director of the bank, attempted to make the approval of the Plan a political issue in the November election of members of the city council. The director headed a group which recommended a slate pledged to vote for approval of the Plan including Parcel 8 and

solicited campaign contributions to promote their election. George F. Foley and Barry Hynes were on that slate. Frederick C. Langone publicly pledged his support before the election. None of the three had heard the evidence introduced in the hearings before the council. On or about November 18, 1963, after the election the defendant Hunter sent George F. Foley and Barry Hynes each a check for $29 as his share of the unexpended surplus of contributions received as their agent.

On April 13, 1964, the mayor resubmitted the Plan to the city council. On May 7, 8, 12, and 13, 1964, the council held hearings on the Plan at which the plaintiff's counsel appeared and proposed objections to the approval of the Plan including Parcel 8. The plaintiffs' counsel suggested that Foley, Hynes, and Langone be disqualified on the ground that they had publicly pledged themselves during the campaign, and Foley and Hynes on the additional ground that they had received compensation for their pledges. During the hearing the plaintiffs' counsel requested Langone to disqualify himself on the additional ground that a member of his immediate family had a financial interest in the Project in that such member was conducting a funeral home in the area, paying rent, and seeking to relocate in the area. All three declined to disqualify themselves and were in the majority on May 25, 1964, when the council approved the Plan by a vote of five to four.

At the hearing the plaintiffs' counsel requested permission to cross-examine witnesses and to call other witnesses on the ground that the proceedings were quasi judicial and that due process required this as a matter of right. The council refused such permission, ruling that the proceedings were legislative and not quasi judicial. At the hearing the plaintiffs also objected to the council reconsidering the Plan including Parcel 8 on the ground that it had been twice submitted and rejected in 1963 with finality, that it

was again submitted without modification or other action by the Authority, and that the determinations of fact made by the council in 1963 were res judicata and not to be set aside by members of the council thereafter elected. On May 25, 1964, the council by a vote of five to four approved the Plan including Parcel 8.

On May 26, 1964, the Authority submitted the Plan to the Division of Urban and Industrial Renewal for approval. On June 12, 1964, at the request of more than twenty-five taxable inhabitants of Boston, the Division held a public hearing at which State Street appeared by counsel. Although the proceeding was one in which State Street was directly involved and there were issues of fact upon which State Street had a constitutional right to be heard, the Division by its temporary director, Carney, denied State Street a fair hearing and refused to permit it to intervene, or to call and examine or to cross-examine witnesses, and to issue subpoenas in the name of the Division, all on the ground that the hearing was legislative and not adjudicatory or quasi judicial.

The plaintiffs' bill further alleges that the Plan submitted by the Authority was invalid and should not have been approved because it did not conform to a general plan for the municipality as a whole and was not sufficiently complete to indicate zoning and planning changes as required by G. L. c. 121, § 26ZZ. There is no general plan for Boston as a whole. The specifications in the Plan for the use of Parcel 8 violate the "zoning ordinances" of Boston, but the Plan does not indicate the changes in the "ordinances" required.

1. At the outset we shall eliminate two defendants whose presence in the discussion is unnecessary. Their demurrers were rightly sustained.

(a) The first is the bank. It will be recalled that it is alleged that the controversy is between the plain-

tiffs and the Authority. The bank may be more than an interested bystander, but it does not have the kind of interest referred to in G. L. c. 231A, § 8 (inserted by St. 1945, c. 582, § 1). In other words, it does not "have or claim any interest which would be affected by the declaration." No contractual right is alleged, and, as to the controversy, the bank is in no different legal position from that of any other prospective tenant.

(b) The second is Hunter, who has no interest whatsoever to be affected by the declaration. His only connection is extremely indirect through two members of the city council, who, as later appears, were not disqualified from voting. His claim for counsel fees we leave to application to the court below, should he be so advised.

2. We next consider certain issues raised by allegations of the bill which have been the subject of decisions of this court. No attention can be paid to the allegations that the property at 10 and 28 State Street is not within a decadent, substandard, or blighted open area and that the Authority had no power to take on such grounds. Courts are not authorized to second guess the Authority in such respects. The allegations, moreover, do not mean that the public bodies designated by statute might not reasonably adjudge otherwise. *Stockus* v. *Boston Housing Authy.*, 304 Mass. 507, 509-510. *Bowker* v. *Worcester,* 334 Mass. 422, 434. *Worcester Knitting Realty Co.* v. *Worcester Housing Authy.*, 335 Mass. 19, 22. See *St. Luke's Hosp.* v. *Labor Relations Commn.*, 320 Mass. 467, 470. *Electronics Corp. of America* v. *City Council of Cambridge,* Mass. .[5]

Nothing is added to the plaintiffs' case by such words of belligerence as "coerce" and "threatened." *Fleming* v.

[5] Mass. Adv. Sh. (1965) 323, 327.

Dane, 298 Mass. 216, 218. *DeVincent Ford Sales, Inc.* v. *First Mass. Corp.,* 336 Mass. 448, 452. Restatement: Torts, § 783, comment a. See dissent of Holmes, J., in *Vegelahn* v. *Guntner,* 167 Mass. 92, 107.

The bill contains an allegation that the Authority originally intended to take the bank property at 28 State Street to widen and reconstruct Congress Street so as to facilitate access to the Project area, but does not allege that there was a similar intention as to the plaintiffs' property at 10 State Street. If the latter property had been included in Parcel 8, it is not denied that it could have been properly so taken, and that the determination of the boundaries of the area was a matter exclusively for the Authority and not subject to judicial review. *Worcester Knitting Realty Co.* v. *Worcester Housing Authy., supra,* 22.

The plaintiffs' case is epitomized in the allegations: "The primary purpose of the taking of the plaintiffs' land was not the public interest, but was to provide a site for a new private office building to be occupied by the defendant bank. The taking was made ostensibly in connection with a redevelopment project of the Authority, now known as the Government Center Project. . . ." This charge must be read with the remainder of the bill in order to determine whether there are sufficient allegations of specific facts to be good on demurrer. These characterizations may be construed as a backhanded way of generalizing that the principal purpose was not public, but such rhetoric is not an adequate substitution for allegations, with adequate specification of facts, that the Project with 10 State Street included in Parcel 8 was not for a public purpose. A most significant omission is any allegation that the members of the Authority were to the least extent involved in any negotiations with the bank or had authorized them or even knew about them. Everything is charged against the administrator. To the extent disclosed by the bill, the vote

of the Authority adopting the Project was proper and entirely legal.

The case does not fall within the illustration in *Despatchers' Cafe Inc.* v. *Somerville Housing Authy.*, 332 Mass. 259, 263, which reads: "It is perhaps possible to imagine a case where the authorities ostensibly taking land for a schoolhouse have no intention of building any schoolhouse at all but are really taking the land to let it lie open for the benefit of adjoining land owned by themselves or for some other irrelevant purpose." The Authority here has voted to take the property for the Government Center Project, and intends to continue to carry out that project. The sole reason apparent for delay is the pendency of litigation. Nothing in *Village on the Hill, Inc.* v *Massachusetts Turnpike Authy.*, Mass. ,[6] in the least degree relaxes the strictures imposed in *Despatchers' Cafe Inc.* v. *Somerville Housing Authy.*, 332 Mass. 259, against "attacking merely the impelling motives of officers authorized to exercise the power of eminent domain and actually exercising that power for authorized purposes" (page 264). The *Village on the Hill* case was tried on the merits.

In order to make a case against the Authority from the allegations of the bill it would be necessary to assume that the administrator was authorized to do and say everything alleged and to assess the Authority with full accountability for the acts and statements attributed to the administrator because he was its chief administrative officer. See *Simonian* v. *Boston Redevelopment Authy.*, 342 Mass. 573, 578n-579.

"No intendment in favor of the pleader can be made upon a demurrer. It admits allegations of fact well pleaded but does not admit inferences from such facts unless they are necessary inferences. It does not admit conclusions of law from facts averred. *Comerford* v. *Meier*, 302 Mass. 398,

[6] Mass. Adv. Sh. (1964) 1245.

402, and cases cited." *Walter* v. *McCarvel,* 309 Mass. 260, 263-264. These are well established principles of very long standing and have been frequently declared. *Dealtry* v. *Selectmen of Watertown,* 279 Mass. 22, 27. *Stockus* v. *Boston Housing Authy.,* 304 Mass. 507, 510-512. *Foster* v. *Shubert Holding Co.,* 316 Mass. 470, 474. *Matek* v. *Matek,* 318 Mass. 677, 679. *Cabot* v. *Assessors of Boston,* 335 Mass. 53, 58. *James Constr. Co. Inc.* v. *Commissioner of Pub. Health,* 336 Mass. 143, 146. *Joyce* v. *Hickey,* 337 Mass. 118, 123. *J. J. Gordon, Inc.* v. *Worcester Telegram Publishing Co. Inc.,* 343 Mass. 142, 143. *Weinstein* v. *Chief of Police of Fall River,* 344 Mass. 314, 317. *Harrington* v. *Worcester,* 345 Mass. 166, 167-168.

There is set forth no adequate specification of facts to substantiate other generalities of the bill. None is found in the bank's protest against the taking of its property. The negotiations said to have taken place among representatives of the bank, of the Authority, and of Cabot do not identify the representatives of anyone, and of the Authority in particular. We cannot supply an allegation that any representatives were authorized to bind the Authority to such an "understanding" which the plaintiffs insist was improper. We do not construe these allegations as meaning that any member of the Authority was such a representative. We infer that none was. Even if one or more members of the Authority had been present, it could not avail the plaintiffs. The members comprise a board of public officers, who must make official decisions, such as are involved in a taking of land, by at least a majority vote given at a duly constituted meeting of the board. They could not act separately or individually. *Alphen* v. *Shadman,* 330 Mass. 608, 609.

Wrung dry of broad generalities, all that is left of the bill of complaint on the point presently considered is a discussion by "representatives" of three parties followed

by an "understanding" which led to the inclusion of 10 State Street in the Project area.

On this point this is the opinion of a majority of the court.

3. We next pass to numerous miscellaneous objections of the plaintiffs to the approval of the Plan (a) by the city council and (b) by the Division.

"Urban renewal projects shall be planned, undertaken and carried out in a city or town by the redevelopment authority thereof. . . ." G. L. c. 121, § 26YY (inserted by St. 1955, c. 654, § 4). "No urban renewal project shall be undertaken until the urban renewal plan therefor has been submitted to, and approved by, the division of urban and industrial renewal; and no urban renewal plan shall be submitted to the division of urban and industrial renewal unless the same has been approved . . . by the mayor with the approval of the city council . . . after due notice and a public hearing." G. L. c. 121, § 26ZZ (as amended through St. 1960, c. 776, § 7).

The statute does not indicate that the function of the city council was meant to be in any sense like that of a court, but rather makes the requirement that the mayor and the council, who are elected, give their sanction to a project initiated by the Authority, all of whose members were appointed.[7] There is nothing in § 26ZZ to show that the Legislature intended a council hearing to resemble one in court with absolute rights of examination and cross-examination. Statements at such a hearing were not evidence. See, generally, Sullivan, Administrative Procedure and the Advocatory Process in Urban Redevelopment, 45 Cal. L. Rev. 134, 143-144. The earlier votes of the council were not res judicata, and could not prevent action by

[7] G. L. c. 121, § 26QQ (as amended through St. 1957, c. 150, § 1); § 26L (as amended through St. 1961, c. 496, § 1). St. 1964, c. 636, § 10.

another council later elected. One might as well contend that a Legislature lacked power to vote to take some action which had been voted down by a previous Legislature.

No member of the city council was disqualified because he had expressed an opinion or taken sides on the merits of the Plan including Parcel 8 whether during an election campaign or at any other time. This rule applies equally to those voting in favor as well as to those opposed. The issue was wholly political in character. *Hayeck* v. *Metropolitan Dist. Commn.*, 335 Mass. 372, 375, and cases cited. It was likewise one of great interest in the community, and the voters were entitled to know the views of the candidates, who had a right, and perhaps a duty, to state their positions. Should the plaintiffs' contention as to disqualification be accepted, a not unlikely result would be that all the members of the council would be affected. What we consider the correct view was well expressed in *Wollen* v. *Borough of Fort Lee,* 27 N. J. 408, where the votes of three councilmen on the approval of a zoning plan were challenged because they publicly announced, when candidates for election, how they would vote. At p. 421 it was said: "[T]his is the democratic process; and it would be contrary to the basic principles of a free society to disqualify from service in the popular assembly those who had made pre-election commitments of policy on issues involved in the performance of their sworn legislative duties. Such is not the bias or prejudice upon which the law looks askance. There is no showing that the minds of these councilmen were not open to conviction in the just fulfillment of what they severally conceived to be a solemn obligation to the community. Otherwise, representative democracy would be subverted, and local self-government denied." If the decision of a lower court in *Saks & Co.* v. *Beverly Hills,* 107 Cal. App. 2d 260, is to the contrary we deem it unconvincing and decline to adopt it.

Equally ineffective as a ground of bias against two council members is the charge that they were beneficiaries of campaign fund contributions related to this issue, and that after the election each received from the defendant Hunter a payment of $29 as his share in the unexpended balance of the fund. Contrary to the allegation in the bill, this was not "compensation for their pledges." In their brief the plaintiffs make broad references to this being within the prohibition of G. L. c. 268A, §§ 3 and 17 (as appearing in St. 1962, c. 779, § 1). In the absence of an express statement in the statute we shall not construe campaign contributions as falling within these sections. They carry heavy panalties by fine and imprisonment and are derived from legislation proposed by the Special Commission on Code of Ethics, § 3 (e)-(i) and §§ 24-27. See 1962 House Doc. No. 3650, pp. 26-27, 38-39. In specifying the scope of the proposed legislation, the commission stated that it made the decision "not to include in the criminal section related subject matters such as . . . campaign contributions . . ." (p. 9).

A further charge of bias against a third member of the city council, Frederick C. Langone, arises from the allegation that "a member of his immediate family had a financial interest in the Government Center Area Project, in that such member of the family was conducting a funeral home in premises located in the Area, paying rent therefor, and seeking to relocate his business within the Area." This is based upon G. L. c. 268A, § 19 (a) (as appearing in St. 1962, c. 779, § 1).[8]

[8] "Except as permitted by paragraph (b), a municipal employee who participates as such an employee in a particular matter in which to his knowledge . . . his immediate family . . . has a financial interest, shall be punished by a fine of not more than three thousand dollars or by imprisonment for not more than two years, or both."

The definition of "immediate family" is given in c. 268A, § 1, as "the employee and his spouse, and their parents, children, brothers and sisters."

The present funeral home site is in the original project area, and not on State Street, as the plaintiffs concede in their brief. The statute is deficient in not containing a definition of "financial interest." 76 Harv. L. Rev. 1209, 1226-1227. The bill is not sufficiently definite to charge Langone with the commission of a criminal offense carrying severe penalties. It does not appear in the allegations that the Plan contains any reference to the funeral home. While the unnamed member of Langone's family may have a financial interest in subsequent decisions of the Authority, nothing discloses that such member had any financial interest in the approval of the Plan with or without Parcel 8.

4. A further contention in the bill is that "the Urban Renewal Plan submitted by the Authority was invalid and should not have been approved because [1] it did not conform to a general plan for the municipality as a whole and [2] was not sufficiently complete to indicate zoning and planning changes as required by G. L. c. 121, § 26ZZ.[9] There is no general plan for the City of Boston as a whole. The specifications in the Plan for the use of Parcel 8 violate the applicable zoning ordinances[10] of the City of Boston,

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[9] Section 26ZZ states in part, "As used in sections twenty-six YY to twenty-six BBB, inclusive, an 'urban renewal plan' shall be construed to mean a plan, as it exists from time to time, for an urban renewal project, which plan (1) *shall conform to the general plan for the municipality as a whole, and (2) shall be sufficiently complete to indicate* such land acquisition, demolition and removal of structures, redevelopment, improvements and rehabilitation as may be proposed to be carried out in the area of the urban renewal project, *zoning and planning changes, if any*, land uses, maximum densities, building requirements, and the plan's relationship to definite local objectives respecting appropriate land uses, improved traffic, public transportation, public utilities, recreational and community facilities, and other public improvements" (italics supplied).

[10] There are no such ordinances. The reference must be to one of the zoning statutes for the city of Boston. St. 1924, c. 488, as amended through St. 1959, c. 193. St. 1956, c. 665, as amended through St. 1964, c. 244.

but the Plan does not indicate the changes in the ordinances required."

Significantly, there is no provision in c. 121 as to how a general plan is to be formulated, by whom, upon what notice, upon what if any hearing, what it shall contain, and many other details. The plaintiffs contend that the failure of the Plan to conform to a nonexistent general plan is jurisdictional. We do not agree. We contrue that provision as requiring conformity only where there is such a general plan.

There is no allegation in case No. 6624 that the Project Plan does not conform to the Boston Center Business District Plan.[11] In cases Nos. 13,348, 13,349, and 6623 there are categorical allegations to that effect. These allegations are too vague to withstand demurrer and are argued in the plaintiffs' briefs only by way of assertion which does not call for consideration in this opinion.[12] *Lolos* v. *Berlin*, 338 Mass. 10, 13-14. *Grozier* v. *Post Publishing Co.*, 342 Mass. 97, 101. *Vappi & Co. Inc.* v. *Aetna Cas. & Sur. Co.* Mass. .[13]

The objection that the Plan was not sufficiently complete to indicate zoning and planning changes is none too clear, especially when taken in connection with statements in State Street's pleadings in cases numbered 13,349 and 6623, where it is charged in identical language that the "Plan

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[11] There is no copy of that Plan before us. We are uninformed what may have been the source of such a plan if there is one. Even if we were so disposed and felt that we were authorized to pass upon the issue, it would not be possible for us to do so.

[12] In Boston the Authority constitutes the city planning board which must find that the project plan is based upon a local survey and conforms to a comprehensive plan for the locality as a whole. St. 1960, c. 652, § 12, second paragraph. G. L. c. 121, § 26ZZ, second paragraph (as amended through St. 1960, c. 776, § 7). An exclusive remedy for any person aggrieved by such a finding is provided by St. 1960, c. 652, § 13, final paragraph.

[13] Mass. Adv. Sh. (1965) 167, 169-170.

calls for erection of a tower building on Parcel 8 which cannot be less than 360 feet in height, but the existing zoning shown by the Plan for the locus imposes a maximum limitation of 155 feet." We construe this as meaning that the Plan shows both (a) that the intention is to erect a structure of not less than 360 feet and (b) that the existing permissible maximum height is 155 feet. This contention of the plaintiffs must fail.

We also note that the supposed requirement is but one matter enumerated in § 26ZZ respecting the completeness of a plan. We are not satisfied that there was any legislative intent to render nugatory all that may have been done on a project because of any omission to comply with this one feature. It is a matter of regret that at least this much of the plan is not available to our examination on demurrer as this would facilitate a decision.

5. We next consider the requirement of approval by the Division. In the bill the plaintiffs repeatedly allege that the Project is one of urban renewal. The Project is admittedly subject to § 26ZZ. This section is in the Housing Authority Law, Part VIII, which is entitled "Urban Renewal Projects." See St. 1955, c. 654, § 4. It provides for a hearing before the city council but none before the Division. Apparently to avoid the consequence of this omission the plaintiffs make the allegation of law that the Authority submitted its project to the Division for approval under both § 26ZZ and § 26KK. The latter section provides for a hearing by the Division but not for one by the council. In the absence of an express provision we shall not adopt a construction that the project is subject to § 26KK, which is in the Housing Authority Law, Part IV, entitled "Land Assembly and Redevelopment Projects." This interpretation is decisive upon the plaintiffs' case against the Division. The plaintiffs were not deprived of any right to be told of, or to take part in, such a proceeding. No con-

stitutional right was involved. See *Hayeck* v. *Metropolitan Dist. Commn.,* 335 Mass. 372, 375, and cases cited.

6. The only prayer of the bill pertinent to declaratory relief is the fourth prayer for a decree that "the taking of the plaintiffs' property by the Authority, made on or about July 23, 1964, was illegal and a nullity." This prayer does not directly affect the bank or Hunter. Their demurrers were rightly sustained, because as to them the bill fails to state a controversy under the declaratory procedure. See *Weinstein* v. *Chief of Police of Fall River,* 344 Mass. 314, 317. On the demurrers of the other defendants it would have been better practice to overrule the demurrers and to make a negative declaration. See *Foley* v. *Springfield,* 328 Mass. 59, 62-63; *Vasilakis* v. *Haverhill,* 339 Mass. 97, 101; *School Comm. of New Bedford* v. *Commissioner of Educ.,* Mass. .[14]

7. Let the entries be made: The interlocutory decrees sustaining the demurrers of the defendant New England Merchants National Bank of Boston and of the defendant Hunter are affirmed. As to the other defendants the interlocutory and final decrees are reversed and a declaration is made that the taking of the plaintiffs' property by the Authority was not illegal and was not a nullity.

So ordered.

THE COMPANION CASES.

1. Case No. 13,348 is a petition for a writ of certiorari by State Street against the city council to quash the proceedings before it and to annul its approval of the Plan. The petitioner appealed from orders sustaining the demurrer and dismissing the petition. One ground of demurrer was in effect that the council's action was not subject to judicial review. There was no error. The council's decision was political. *Stacy* v. *Mayor of Haverhill,* 316 Mass. 759.

[14] Mass. Adv. Sh. (1965) 1029, 1030-1031.

Clark v. *City Council of Waltham*, 328 Mass. 40, 42. *Natick Trust Co.* v. *Board of Bank Incorporation*, 337 Mass. 615, 617. *City Bank & Trust Co.* v. *Board of Bank Incorporation*, 346 Mass. 29, 32. *First Church of Christ, Scientist, in Boston, Mass.* v. *Alcoholic Beverages Control Commn.*, Mass. , .[15] Also let it be noted that a petition for certiorari is addressed to the sound discretion of the court. *Loranger* v. *Martha's Vineyard Regional High Sch. Dist. Sch. Comm.*, 338 Mass. 450, 459, and cases cited.

Orders affirmed.

2. Case No. 6622 is a bill in equity by State Street, purportedly under G. L. c. 268A, § 21 (as appearing in St. 1962, c. 779, § 1), against the city council, the Authority, the bank, and Hunter. Demurrers to the bill were sustained, one common ground being, in substance, failure to state a cause of action. The plaintiff appealed from interlocutory decrees sustaining the demurrers and from a final decree dismissing the bill. The matters alleged in the bill we have considered and rejected. We also have held that the bank and Hunter were not parties interested in those matters. We express doubt whether the plaintiff has any right of action under § 21, but do not feel required to rest our decision on that ground where no error appears.

Decrees affirmed.

3. Case No. 6623 is a petition by State Street, purportedly under G. L. c. 30A, § 14 (the State Administrative Procedure Act), against the Division to obtain a review of its decision approving the Project. The respondent demurred, one ground being lack of jurisdiction of the subject matter. The petitioner appealed from an interlocutory decree sustaining the demurrer and from a final decree dismissing the petition. There was no error. The decision was not "in an adjudicatory proceeding," which, as defined

[15] Mass. Adv. Sh. (1965) 863, 864.

in c. 30A, § 1 (1), "means a proceeding before an agency in which the legal rights, duties or privileges of specifically named persons are required by constitutional right or by any provision of the General Laws to be determined after opportunity for an agency hearing." *Westland Housing Corp.* v. *Commissioner of Ins.*, 346 Mass. 556, 557.

Decrees affirmed.

4. Case No. 13,349 is a petition for a writ of certiorari by State Street against the temporary director of the Division and the Authority, seeking review of the temporary director's determination in approving the Project. The Division is not made a party but, as the temporary director does not raise the question, we shall not discuss it. The prayer of the petition as concerns the temporary director is that "the approval of said Plan by the respondent Carney may be annulled." The prayer against the Authority is for an injunction against taking the petitioner's property by eminent domain. Both respondents demurred, one ground being that no case is stated in the petition. The petitioner appealed from orders sustaining the demurrers and from an order "denying" the petition.

The proceeding in so far as it concerns the Division or its temporary director must fail for reasons already considered by us. The prayer against the Authority falls with that against the Division or its temporary director.

Orders affirmed.

S-6624
S-13,348
S-13,349
S-6622
S-6623

KIRK, J. (dissenting, with whom Spiegel, J., joins) My chief concern is the disposition made by the majority of the plaintiffs' "principal bill for declaratory relief" in so far as it relates to the Authority and to the bank. The

majority hold that the Authority is entitled, on demurrer, to a declaration that the taking of the plaintiffs' property was legal, and that, as against the bank, no case has been stated which entitles the plaintiffs to relief.

On the record before us, I am unable to agree. The allegations which are fairly stated in the majority opinion present, I submit, a case which should be tried on the merits before final disposition is made. In summary, as I read the bill, it is alleged that the Authority, recognizing that its planned Government Center Project was in jeopardy because of the bank's opposition to the taking of its building, made a deal to appease the bank whereby, if private negotiations failed, the Authority would take the plaintiffs' building, which was not within the planned Project, so that the bank could continue in business at its existing building pending the replacement of the plaintiffs' building by a tower structure to be erected by a developer selected by the bank. When completed, the first ten floors of the tower building were to be leased to the bank. The plaintiffs' property has, in fact, been taken by the Authority.

In essence the plaintiffs allege a scheme pursuant to which the Authority exercised its power of eminent domain as a device to take the plaintiffs' property for the use of the bank and not for any public agency included within the Government Center Project. The charge, it seems to me, requires a hearing on the merits rather than a disposition, based solely on a dilatory plea, which has the twofold effect of a final foreclosure of such a hearing and a binding determination of the rights of the parties. We are limited to the actual allegations of the bill. The Authority and the bank have chosen to stand on their demurrers and thereby admit those allegations. That there may be facts which justify the taking of the plaintiffs' building for the Project is beside the point. If there be such facts they are not before us in any form. There is no answer; there is no

denial. There is no fact of which judicial notice may be taken which compels a determination that the taking was legal. The Authority and the bank should be held to the consequences of their pleadings and be required to go to trial as would any other litigant.

A few additional observations are in order. The opinion states that the plaintiffs' case does not fall within the illustration given by Chief Justice Qua in *Despatchers' Cafe Inc.* v. *Somerville Housing Authy.*, 332 Mass. 259, 263. It could be said that the case in a strictly literal sense does not come within the specific illustration cited. I respectfully suggest, however, that the purpose of the taking, as here alleged, is more flagrant than anything suggested by the illustration in the *Despatchers' Cafe* case and is indistinguishable in principle. It is the taking by a public authority of land with building of private persons so that other private persons may construct, for their own use and benefit, a different building on the land taken.

I likewise suggest that the issue here presented is not, as the opinion intimates, what were "the impelling motives of officers authorized to exercise the power of eminent domain," but rather is whether the Authority was "actually exercising that power for authorized purposes." I submit that on the pleadings, a case of the nature envisioned by Chief Justice Qua is now before us in aggravated form and should be dealt with.[16]

Other grounds relied upon by the majority to support their conclusions seeem to me to be insubstantial. It is said, for example, that the acts and statements of the chief administrative officer of the Authority in connection with the taking are not attributable to the Authority. I

[16] "It will be time enough to deal with such a case when it arises." Qua, C.J., in *Despatchers' Cafe Inc.* v. *Somerville Housing Authy.* 332 Mass. 259, 263.

find it difficult to reconcile this statement with what was said in *Costonis* v. *Medford Housing Authy.*, 343 Mass. 108, 114-115. In any event, the question of the capacity of the chief administrative officer to act and speak for the Authority, if indeed it is controverted, could be and should be resolved at the trial and is not, in my judgment, either cumulatively or independently, sufficient reason for denying the plaintiffs a trial.

Similarly, the majority's statement that the position of the bank with respect to the proposed tower building is "no different legal position from that of any other prospective tenant" impresses me as unrealistic in view of the allegations that the bank stood athwart the original plan, participated in the arrangement for the taking of the plaintiffs' land, selected the developer who was to construct the new building on that land, and made an agreement for a lease of the first ten floors of the new building. If, on these allegations, the bank is not an indispensable party to the litigation, it should, in my opinion, be regarded at least as a proper and perhaps a necessary party as those terms are customarily applied. See *Minnesota* v. *Northern Sec. Co.*, 184 U. S. 199, 235-236; *Franks* v. *Markson*, 337 Mass. 278, 283.

Transcending the effect of the holding of the majority in the present case are its implications for the future. On the one hand, it is difficult to foresee how any landowner will ever have access to a forum to show that the power of eminent domain is being exercised for a private purpose by a public authority vested with that power. On the other hand, it is not difficult to conceive of situations wherein economically powerful private interests, shielded by the opinion of the majority and working behind the facade of a public authority which has the power of eminent domain, will be enabled to become the real beneficiaries of the exercise of that power in contravention of

Article X of the Declaration of Rights of the Constitution of the Commonwealth.

For the reasons stated and to the extent indicated, I dissent from the disposition of the bill for declaratory relief. I would order that the demurrers of the Authority and the bank be overruled, that they be required to answer, and that the case proceed to trial with the least practicable delay.

Appendix B

Chapter 231A

§ 1.

The supreme judicial court, the superior court, the land court and the probate courts, within their respective jurisdictions, may on appropriate proceedings make binding declarations of right, duty, status and other legal relations sought thereby, either before or after a breach or violation thereof has occurred in any case in which an actual controversy has arisen and is specifically set forth in the pleadings and whether any consequential judgment or relief is or could be claimed at law or in equity or not; and such proceeding shall not be open to objection on the ground that a merely declaratory judgment or decree is sought thereby and such declaration, when made, shall have the force and effect of a final judgment or decree and be reviewable as such; provided, that nothing contained herein shall be construed to authorize the change, extension or alteration of the law regulating the method of obtaining service on, or jurisdiction over, parties or affect their right to trial by jury. When a declaration of right, or the granting of further relief based thereon, shall involve the determination of issues of fact triable by a jury as of right and as to which a jury trial is duly claimed by the party entitled thereto, or issues which the court, in accordance with the practice of courts of equity, considers should be tried by a jury, such issues may be submitted to a jury in the form of questions, with proper instructions by the court, whether a general verdict be required or not.

§ 2.

The procedure under section one may be used to secure determinations of right, duty, status or other legal relations under deeds, wills or written contracts or other writ-

ings constituting a contract or contracts or under the common law, or a charter, statute, municipal ordinance or by-law, or administrative regulation, including determination of any question of construction or validity thereof which may be involved in such determination.

The foregoing enumeration shall not limit or restrict the exercise of the general powers conferred in section one in any proceeding where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty.

§ 3.

The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceedings or for other sufficient reasons. The reasons for such refusal shall be stated in the record.

§ 4.

All orders, judgments, decrees and refusals under this chapter may be reviewed as other orders, judgments and decrees.

§ 5.

Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree to show cause why further relief should not be granted forthwith.

§ 6.

In an action at law or suit in equity heretofore or hereafter brought to obtain a judgment or other consequential

relief, whether such judgment or relief is granted or not, the court may make a binding determination as provided in this chapter upon application of any party made in his declaration, bill, petition or answer.

§ 7.

Where a judgment or other consequential relief is sought in an action or suit, the costs shall not be affected by the making or refusal of any determination; but in a suit for a determination only, under this chapter, costs shall be as in other cases in equity.

§ 8.

When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or by-law or of a franchise, license, easement or other privilege granted by the commonwealth or a municipality thereof, the municipality, or the agency granting the privilege, as the case may be, shall be made a party and shall be entitled to be heard. If a question of constitutionality is involved in any proceeding under this chapter, the attorney general shall also be notified of the proceeding and be entitled to be heard.

§ 9.

This chapter is declared to be remedial. Its purpose is to remove, and to afford relief from, uncertainty and insecurity with respect to rights, duties, status and other legal relations, and it is to be liberally construed and administered. Nothing in this chapter shall be held to affect the jurisdiction of the land court, and the procedure established hereby shall be in addition to any other procedure for declaratory relief.

Rule 28

Demurrers, Pleas and Answers in Equity

(Applicable to equity cases)

The defendant, at any time before the bill is taken for confessed, or afterwards by leave of court, may demur, plead or answer to the bill; and he may demur to part, plead to part, and answer as to the residue.

The court may give leave *ex parte* to a defendant to file a demurrer or plea, reserving his answer. In the absence of such leave, the defendant must (a) file at the same time his demurrer, plea and answer, or such of them as he may desire, and shall have no right without leave of court to file another of such pleadings after filing any one of them, or (b) include in his answer any special matter by way of demurrer and plea, or either of them, describing such matter clearly as by way of demurrer or plea as the case may be, in which case and not otherwise he shall have the same benefit therefrom as if he had pleaded the same or demurred to the bill.

If a plea or demurrer shall be filed, with leave to reserve the answer, and the plea or demurrer shall be overruled or disproved, no other plea or demurrer shall be received without leave of court, but the defendant shall within ten days answer the bill.

If, upon an issue on a plea, the facts pleaded be determined for the defendant, they shall avail him only as far as in law and equity they ought to avail him.

Appendix C.

August 30, 1965

Hon. Raymond S. Wilkins
Chief Justice
Supreme Judicial Court
Court House
Boston, Mass.

My dear Mr. Chief Justice:

On behalf of the plaintiffs in the case of *Moskow et al. v. Boston Redevelopment Authority et al.*, No. 6624, I hereby respectfully request a rehearing with respect to the following paragraph which appears on page 19 of the typewritten opinion of the Court:

> "7. Let the entries be made: The interlocutory decrees sustaining the demurrers of the defendant New England Merchants National Bank of Boston and of the defendant Hunter are affirmed. As to the other defendants the interlocutory and final decrees are reversed *and a declaration is made that the taking of the plaintiffs' property by the Authority was not illegal and was not a nullity.*" (emphasis mine.)

This is a case in which the plaintiffs have never had an opportunity to introduce evidence, or to be heard as to the kind of declaratory judgment to be issued. They were deprived of that opportunity by the action of the Superior Court in sustaining demurrers which asserted that plaintiffs had no right to any kind of declaration. Their appeals from that action raised but one question: Do the plaintiffs have a right to *some kind* of declaration.

The Court's disposition of the case holds on the one hand that the plaintiffs were right, and the Superior Court wrong, and on the other hand deprives the plaintiffs of the fruits of their victory by entering a declaration against them before they have had any opportunity to introduce evidence or be heard as to the content of the declaration.

In support of this result the Court relies upon *Foley v. Springfield,* 328 Mass. 59, 62-63; *Vasilakis v. Haverhill,* 339 Mass, 97, 101, and *School Committee of New Bedford v. Commissioner of Education,* Mass. Adv. Sh. (1965) 1029, 1030-1031.

The *Foley case* was heard on a case stated. The *Vasilakis case* came to this Court on a record which included findings of fact made after a trial in the Superior Court. In each of those cases the plaintiff (as well as defendant) had an opportunity to establish the facts and to be heard thereafter in both this Court and the Superior Court as to the content of the declaration to be issued. The record in the *New Bedford case* closely resembles the present record in that it contained no case stated or finding of facts, the Superior Court there, as here, having sustained a demurrer to the petition. There, as here, this Court held that the demurrer should have been overruled, and then went on to say:

> "It may be that the bill states with substantial accuracy the relevant facts. That however, cannot be determined in advance of the filing of the defendants' answers and trial on the merits. Thus we do not afford declaratory relief finally on this record . . ." Mass. Adv. Sh. (1965) 1029, 1031—

I respectfully submit that here, as in the *New Bedford case,* no declaration should be made "in advance of the filing of defendants' answers and trial on the merits."

In order to protect the rights of plaintiffs I am bound to state further to the Court that the entry of a binding declaration on the present record deprives the plaintiffs of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, in that they have never had the opportunity to establish the relevant facts by introducing evidence, nor the opportunity to be heard as to the proper declaration

to be entered after the facts are established. Upon this point I respectfully refer the Court to the opinion of Mr. Justice Holmes in *Saunders v. Shaw,* 244 U.S. 317, 320:

> "... But when the act complained of is the act of the Supreme Court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here. The defendant was not bound to contemplate a decision of the case before his evidence was heard and therefore was not bound to ask a ruling or to take other precautions in advance. The denial of rights given by the Fourteenth Amendment need not be by legislation. *Home Telephone & Telegraph Co. v. Los Angeles,* 227 U.S. 278 . . ."

A copy of this letter has been sent to counsel for each of the parties.

Respectfully yours,

JAMES W. KELLEHER

SUPREME JUDICIAL COURT
Boston, Massachusetts

John V. Spalding
Associate Justice

October 4, 1965

James W. Kelleher, Esquire
73 Tremont Street
Boston, Massachusetts

Dear Sir:

Your request for rehearing in case No. 6624, *Moskow* v. *Boston Redevelopment Authority,* has been considered by the full court and is denied. The opinion is to stand as originally written.

Yours very truly,
(s) JOHN V. SPALDING

cc: CLAUDE B. CROSS, *Esquire*
LEWIS H. WEINSTEIN, *Esquire*
WILLIAM H. KERR, *Esquire*
RICHARD WAIT, *Esquire*
JASON A. AISNER, *Esquire*

Appendix D.

Brief for Appellants, p. 60:

CONCLUSION

For the reasons stated, the interlocutory decrees sustaining the demurrers in all five cases should be reversed, and the final decrees should be reversed. The orders denying the motions of the petitioner or plaintiff in the first four cases to add parties and to amend should be vacated, and the Superior Court authorized to rehear those motions and conduct such further proceedings as may be proper.

Respectfully submitted,
CLAUDE B. CROSS,
JOHN M. REED,
Attorneys for Appellants.

Brief for Boston Redevelopment Authority, p. 68:

CONCLUSION

Despite a plethora of papers and words, plaintiffs have failed to make allegations entitling them to any relief in any of their various proceedings. For the reasons stated herein, this Court should affirm the orders of the Superior Court sustaining all demurrers in all five cases, the judgment of the Superior Court dismissing the petition in No. 593464, the final decree of the Superior Court dismissing with costs the bill in No. 82572 Equity, the order of the Superior Court denying the petition in No. 594464, the final decree of the Superior Court dismissing with costs the petition in No. 82705 Equity, the final decree of the Superior Court dismissing with costs the bill in No. 82973 Equity, and the orders of the Superior Court denying the motions of the petitioner or plaintiff in Nos. 593464, 82572

Equity, 594464 and 82705 Equity to add parties and to amend.

Respectfully submitted,
LEWIS H. WEINSTEIN
VERNE W. VANCE, JR.
Attorneys for Defendant and Amicus Curiae
Boston Redevelopment Authority

JOHN C. CONLEY
General Counsel
Boston Redevelopment Authority
FOLEY, HOAG & ELIOT
Of Counsel

Brief for Division of Urban and Industrial Renewal, p. 17:

CONCLUSION

For the reasons given, the demurrers of the parties on behalf of whom this brief is submitted were properly sustained. In Cases Nos. 6623 and 6624 the interlocutory and final decrees should be affirmed. In Case No. 13,349 the order for judgment should be affirmed.

Respectfully submitted,
EDWARD W. BROOKE,
Attorney General,
By DAVID BERMAN,
Assistant Attorney General.

CONCLUSION

Brief for City of Boston and City Council of Boston, p. 13:

It is thus respectfully submitted that in No. 6,624 this Court should affirm the action of the Court below in sustaining (R. 15) the demurrer of the City of Boston and its City Council and in entering (R. 23) a final decree dismissing the bill.

Respectfully submitted,
ARTHUR G. COFFEY,
Corporation Counsel,
and
WILLIAM H. KERR,
Attorneys for the City of Boston and the City Council of Boston.

Brief for New England Merchants National Bank, p. 5:

CONCLUSION

We urge that the interlocutory decrees and the final decrees in the above two cases be affirmed with costs.

Respectfully submitted,
RICHARD WAIT.

Brief for Andrew A. Hunter, p. 5:

CONCLUSION

The respondent Andrew A. Hunter is not a proper party to either proceeding as there is no relief sought against him. There is no controversy in existence between the plaintiffs and him. No cause of action at law or in equity is set forth against him. He has no legal interest in the property in question. No order may be entered in respect of him. He has no rights that may be affected by a declaration. Therefore the interlocutory and final decrees ought to be affirmed.

Respectfully submitted,
JASON A. AISNER.

Appendix E.

Brief for Petitioner in *Willcutt v. Prescott,* 340 Mass. 532, pp. 9-10:

CONCLUSION

The petitioners request this court to order that the demurrers of the respondents be overruled.

The petitioners request this court to declare that the agreement of July 7, 1934, need not be wholly made void, but that, until the trial is over, payments of 1/5 of 80% of the income shall be paid to William B. Willcutt, Emma W. Fletcher, the petitioners, and to the three children of Levi Willcutt, and that the trust be declared a specific trust without any general charitable intent and that William B. Willcutt and Emma W. Fletcher shall share with the petitioners and others equally if the trust fails.

Respectfully submitted,
ARTHUR M. BEALE,
Attorney for Petitioners.

Brief for petitioner in *Trustees of Reservations* v. *Stockbridge,* Mass. Adv. Sh. (1965) 265, at p. 15:

IV. CONCLUSION

For the reasons stated, the taking by the Town should be declared illegal and of no force or effect and the Town be restrained from entering upon the land of the Trustees or in any way interfering with the petitioner's occupation thereof.

Respectfully submitted,
HERBERT P. GLEASON.

HILL, BARLOW, GOODALE & ADAMS,
Of Counsel.

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Supreme Court of the United States.

OCTOBER TERM, 1965.

No. 745.

ABRAHAM MOSKOW ET AL.,
Petitioners,

v.

BOSTON REDEVELOPMENT AUTHORITY ET AL.,
Respondents.

BRIEF ON BEHALF OF RESPONDENTS NEW ENGLAND MERCHANTS NATIONAL BANK OF BOSTON AND ANDREW A. HUNTER IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

RICHARD WAIT,
JASON A. AISNER,
Solicitors for the Respondents New England Merchants National Bank of Boston and Andrew A. Hunter.

ALDEN C. MITCHELL & SON, INC., LAW PRINTERS, BOSTON.

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Supreme Court of the United States.

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Respondents.

BRIEF ON BEHALF OF RESPONDENTS NEW ENGLAND MERCHANTS NATIONAL BANK OF BOSTON AND ANDREW A. HUNTER IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

The New England Merchants National Bank of Boston and Andrew A. Hunter, two of the respondents in the above-entitled case, join in this brief in opposition to the petition for certiorari. Their position is different from that of the other respondents. Each demurred to the petitioners' bill of complaint. The primary reliance of each was that no declaration was asked against either.* Their demurrers were sustained in the Superior Court and on appeal the Supreme Judicial Court affirmed the interlocutory decrees sustaining them. That court said in its opinion:

> "The only prayer of the bill pertinent to declaratory relief is the fourth prayer for a decree that 'the taking

*The statement on page 5 of the Petition that the respondent Hunter was a director of the bank is not so. He is not and never has been a director of that bank.

> of the plaintiffs' property by the Authority . . . was illegal and a nullity.' This prayer does not directly affect the bank or Hunter. Their demurrers were rightly sustained, because as to them the bill fails to state a controversy under the declaratory procedure." (Petition, p. 29.)

The petitioners do not attack this position in their present petition. The question they ask the court to answer is:

> "May the Supreme Judicial Court, after reversing the Superior Court and overruling the demurrers, simultaneously and without further notice or hearing enter a judgment declaring the taking valid, without violating the due process clause of the Fourteenth Amendment to the United States Constitution?" (Petition, p. 3.)

The Supreme Judicial Court did not overrule our demurrers. It affirmed the action of the Superior Court in our favour. Consequently by its language the petitioners' "Question Presented" does not touch us and it might be appropriate for us to stop with that statement. But we are named as respondents and, if the petition should be granted, we would still be involved in the litigation, which we do not desire, so we state, as concisely as may be, why the petition should be denied in toto.

The point which has been presented is not a constitutional one at all. It is simply a question of practice in the Massachusetts courts on proceedings for declaratory relief. If instead of ordering the entry of a negative declaration the court had simply affirmed the final decree, no such point could have been made. But the result would have been precisely the same. A decree dismissing a bill of complaint establishes finally that no relief can be granted to the plain-

tiff on the facts set forth in the bill. In the face of such a decree no possible avenue would have remained open on which the plaintiffs could have attacked the title which the Authority obtained when it took the plaintiffs' land. All that the plaintiffs sought was to impeach the taking. A simple decree dismissing the bill following appearance by the Authority would have established that the taking was not impeachable quite as fully as the declaration actually entered that it "was not illegal and was not a nullity."

Counsel for the petitioners are not exact when they say:

> "The true meaning of the rule is that a demurrer raises only the question *whether any,* not the question *what,* declaration should be entered. The question *'what'* is *immaterial* on demurrer; it is left for later disposition, both as to questions of law and questions of fact, if the demurrer be overruled. And if the demurrer be sustained there is clearly, under Massachusetts practice, no judgment on the merits." (Petition, p. 10.)

Under Massachusetts practice a final decree following an interlocutory decree sustaining a demurrer is just as much a final decision on the record as one entered following a trial on the merits.

Keown v. *Keown,* 231 Mass. 404, 408.

The Massachusetts court made it quite clear that the point is one of practice, not of substance. The Chief Justice said:

> ". . . it would have been better *practice* to overrule the demurrers and enter a negative declaration." (Petition, p. 29; emphasis supplied.)

Patently, this Court is not going to concern itself with the niceties of Massachusetts practice.

Due process could enter the picture only if the practice were such as to deny the petitioners the right to put forward their case. The decision was made wholly on the basis of their own statement of that case. Every fact pleaded by the petitioners was fully admitted by the demurrers. If there had been a trial, the proof could not have outrun the allegations. The petitioners put their best foot forward and were satisfied they had done so. The Superior Court in sustaining the demurrers did not deny the plaintiffs' leave to amend, and under the rule amendments might have been offered if any facts had been left out.* But none was offered. The "facts" were established quite as fully as if there had been a trial. That being so, there was no obstacle to a declaration.

Berman v. *Parker,* 348 U.S. 26.

We are quite unable to understand how the petitioners can say, as they do in discussing *Willcutt* v. *Prescott,* 340 Mass. 532, and *Trustees of Reservations* v. *Stockbridge,* 1965 Adv. Sh. 265 (at pp. 10 and 11 of the Petition): "The Court in each case categorically stated, *what it could not* and did not *state in the opinion in this case,* that 'There are no facts in dispute . . .'" (Emphasis supplied.)

Granted that the court did not state that, it could have done so had it wanted to state the obvious. The case was heard on demurrer and on such a hearing no fact can be in dispute.

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*Superior Court Rule 23: ". . . If a demurrer is sustained, and leave to amend is not denied, a case shall be deemed ripe for final judgment or decree only after ten days from the sustaining of the demurrer, or such other time as the court may allow for amendment, and then only after the disposition of any motion to amend the pleading demurred to, filed within such time. After the expiration of such time no motion to amend such pleading shall be filed without leave of court."

On the question of the propriety of making a binding declaration on demurrer a clear distinction exists between a declaration adverse to the plaintiff and one in his favour. If it appears on the allegations made by the plaintiff himself that he is not entitled to the affirmative declaration which he asks, there is no reason against making a negative one. The allegations are his own. On the other hand, they may not be susceptible of proof, however honestly made, and the law gives every defendant the privilege to demur without foreclosing further defense, so, as pointed out in *School Committee of New Bedford* v. *Commissioner of Education*, Mass. Adv. Sh. (1965) 1029, it is not appropriate to make a declaration in favour of the plaintiff at that stage. The *New Bedford* case consequently does not exactly resemble the case at bar as the petitioners assert at page 9 of the Petition. If the plaintiffs' allegations fail to show a cause of action, he cannot prove a case. If they do show a cause of action, he still may not prove a case.

Insofar as the petitioners' complaint is that they were not heard on what the declaration should be, there is nothing in it. The declaration made related solely to the validity of the taking—which was all that the petitioners had asked to be declared. The entire argument on the appeal (save for the question of whether the bank and Hunter were properly concerned) was addressed by both sides to the validity of the taking. No word which counsel desired to utter or to print was shut off. The form of the declaration changed the petitioners' own language from affirmative to negative and did no more. As far as wording went, once the court had determined that the allegations were insufficient to impeach the taking, there was nothing to argue about. Moreover, there was a further hearing in the Superior Court before the entry of the final decree after rescript at which any question of wording could have been raised.

The Petition does not endeavour to reach the merits and asserts no error, constitutional or otherwise, in the substantive decision by the Supreme Judicial Court that the circumstances leading to and causing the taking of the petitioners' property did not vitiate the taking. No respondent, consequently, is called upon to discuss the merits. The point presented is one of practice and nothing more. We submit that the answer to the "Question Presented" set forth on page 3 of the Petition is "Yes," and urge the court to deny the Petition for Certiorari.

Respectfully submitted,

RICHARD WAIT,

JASON A. AISNER,

Solicitors for the Respondents New England Merchants National Bank of Boston and Andrew A. Hunter.

Supreme Court of the United States

October Term, 1965
No. 745

ABRAHAM MOSKOW *ET AL.*,
Petitioners,

vs.

BOSTON REDEVELOPMENT AUTHORITY *ET AL.*,
Respondents.

BRIEF OF CITY OF BOSTON AND ITS CITY COUNCIL OPPOSING PETITION FOR WRIT OF CERTIORARI

Introductory Statement.

The petition herein (p. 1) prays that "a writ of certiorari issue to review the judgment of the Supreme Judicial Court of Massachusetts entered in the above-entitled case on August 17, 1965." Rule 21 (1) of this Court requires that the transcript of the record filed with a petition for a writ of certiorari include "the proceedings in the court whose judgment or decree is sought to be reviewed". In this case, those proceedings included the filing of briefs. Since copies of such briefs have not been included in the transcript filed by the petitioners, respondents submitting this brief are, pursuant to Rule 21 (6), filing as additional record a duly certified copy of the petitioners' brief because of its importance in establishing how they presented the case to the Supreme Judicial Court of Massachusetts.

Argument.

Paraphrased, the question presented by the petition at bar is whether, in this proceeding in equity for declaratory relief, the Supreme Judicial Court of Massachusetts denied the petitioners due process of law when, after reversing interlocutory decrees sustaining demurrers and a final decree dismissing the bill, the Supreme Judicial Court ordered a final decree making a declaration unfavorable to the petitioners without further opportunity to be heard.

The appeal from the final decree dismissing the bill (R. 23) brought the whole case to the Supreme Judicial Court. *Merchants Mutual Casualty Co.* v. *Leone*, 298 Mass. 96, 100.

Even a cursory examination of the brief filed in the Supreme Judicial Court of Massachusetts by the petitioners will disclose that the question whether a declaration favorable to the petitioners could be made on the averments set forth in the petitioners' bill was argued at length before that Court. Since in the opinion of that Court no declaration in favor of the petitioners could be made on those averments, there was no occasion for a further opportunity to be heard. *Willcutt* v. *Prescott*, 340 Mass. 532, 535.

In this Court, the petitioners (Petition, p. 12) rely on *Saunders* v. *Shaw*, 244 U. S. 317, where, as this Court in *American Surety Co.* v. *Baldwin*, 287 U. S. 156, 164, observed, the federal claim arose from the *unanticipated* disposition of the case at the close of the proceedings in the state supreme court. In view of the various arguments advanced by the petitioners in their brief in the Supreme Judicial Court of Massachusetts, we submit it is hard to conclude that petitioners did not anticipate that the Supreme Judicial Court of Massachusetts might dispose of the case on the averments in the petitioners' bill. Moreover, this case is quite unlike the *Saunders* case where the state supreme court, admitting

evidence excluded at the trial, decided *for* the plaintiff without permitting the defendant to offer testimony to rebut the evidence excluded by the trial court. In the case now at bar, the Supreme Judicial Court of Massachusetts decided *against* the petitioners on their own averments. The action of the Massachusetts court in this case may be likened to a state court's entering judgment against a plaintiff upon plaintiff's opening statement to a jury. It would seem elementary that such action does not deprive a plaintiff of due process of law. "Due process of law is not concerned with mere afterthoughts." *Helis* v. *Ward*, 308 U. S. 365,370.

The petition at bar (p. 12) also relies on *Reynolds* v. *Stockton*, 140 U. S. 254, and *Hovey* v. *Elliott*, 167 U. S. 409. In the *Hovey* case (p. 446), this Court recognized that the *Reynolds* case concerned a decree which "passed upon questions not at issue in the cause, and was rendered against a party who had taken no actual part in the litigation subsequent to the filing of his answer." In the *Reynolds* case itself, this Court had noted (p. 266) that it was not there concerned with a case "in which, while the matter determined was not, in fact, put in issue by the pleadings, it is apparent from the record that the defeated party was present at the trial and actually litigated that matter." The *Reynolds* case is thus not in point at bar, we submit, because it is apparent from the petitioners' brief in the Supreme Judicial Court of Massachusetts that the petitioners actually litigated whether a declaration favorable to the petitioners could be made on the petitioners' averments.

In *Hovey* v. *Elliott*, 167 U. S. 409, this Court perceived (p. 446) "no distinction in principle between determining a cause upon issues not raised by the pleadings in the actual absence of the party [the *Reynolds* case], and rendering a decree by refusing to permit a defendant to be heard in his

defence or to consider the merits of a sufficient defence, and, indeed, by striking the pleading containing such defence from the files" [the *Hovey* case]. The *Hovey* case was, to use the language of this Court in *Societe Internationale* v. *Rogers*, 357 U. S. 197, 209, "substantially modified" by *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322, 349–351, where, to employ the language of this Court in the *Societe Internationale* case (p. 210), this Court ruled that "a state court, consistently with the Due Process Clause of the Fourteenth Amendment, could strike the answer of and render a default judgment against a defendant who refused to produce documents in accordance with a pretrial order." Even without this modification, however, the *Hovey* case is readily distinguishable from the case at bar where it is clear from the decision of the Supreme Judicial Court of Massachusetts (Petition, pp. 19–29) that it heard the petitioners on every point they advanced to show that a declaration favorable to them should be made on the averments in their bill.

In closing, we invite attention to a statement made by this Court in *Allen* v. *Georgia*, 166 U. S. 138, and quoted with approval in *Hovey* v. *Elliott*, 167 U. S. 409, 443, and also in *Wilson* v. *North Carolina*, 169 U. S. 586, 593–594: "To justify any interference upon our part, it is necessary to show that the course pursued has deprived, or will deprive, the plaintiff in error of his life, liberty or property without due process of law. Without attempting to define exactly in what due process of law consists, it is sufficient to say that, if the Supreme Court of a State has acted in consonance with the constitutional laws of a State and its own procedure, it could only be in very exceptional circumstances that this court would feel justified in saying that there had been a failure of due legal process. We might ourselves have pur-

sued a different course in this case, but that is not the test. The plaintiff in error must have been deprived of one of those fundamental rights, the observance of which is indispensable to the liberty of the citizen, to justify our interference." 166 U. S. 138, 140–141.

Conclusion.

In view of the matters hereinbefore set forth, it is submitted that the petition for a writ of certiorari in this case should be denied.

Respectfully submitted,

WILLIAM H. KERR,
City of Boston Law Dept.,
11 Beacon Street,
Boston, Massachusetts 02108,
Attorney for the City of Boston and Christopher I. Iannella, George F. Foley, William J. Foley, Frederick C. Langone, John J. Tierney, Jr., Barry Hynes, John E. Kerrigan, Peter F. Hines and Katherine Craven as they constitute the City Council of the City of Boston.

Of Counsel:

ARTHUR G. COFFEY,
Corporation Counsel of the City of Boston.

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Supreme Court of the United States.

OCTOBER TERM, 1965.

No. 745.

ABRAHAM MOSKOW ET AL.

v.

BOSTON REDEVELOPMENT AUTHORITY ET AL.

BRIEF ON BEHALF OF THE DIRECTOR OF THE DIVISION OF URBAN RENEWAL OF THE DEPARTMENT OF COMMERCE AND DEVELOPMENT OF THE COMMONWEALTH OF MASSACHUSETTS AND ON BEHALF OF SAID DIVISION IN OPPOSITION TO REVIEW BY CERTIORARI.

EDWARD W. BROOKE,
Attorney General,
By David Berman,
Assistant Attorney General,
State House,
Boston, Massachusetts 02133.

ADDISON C. MITCHELL & SON, INC., LAW PRINTERS, BOSTON.

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II. Since Massachusetts is not constitutionally required to provide any form of judicial review of an administrative or legislative determination that property be taken by eminent domain for purposes of urban renewal, any error that the Supreme Judicial Court could have made in ordering the declaration against the petitioners is harmless 10

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Citations to Opinions Below.

This topic is adequately presented in the petition.

Jurisdiction.

For reasons to be discussed in this brief, this Court lacks jurisdiction under 28 U.S.C. § 1257 (3), or any other provision of law to review the decision of the Supreme Judicial Court.

Questions Presented.

Two questions will be presented in this brief:

1. May a Court of competent jurisdiction considering a bill for declaratory relief brought pursuant to a state declaratory judgment statute enter a final decree terminating the controversy against the plaintiffs if, taking all the allegations of the bill as true, the Court is persuaded that the plaintiffs are not entitled to the declaration prayed for?

2. Even if it is assumed, *arguendo*, that the first question ordinarily should be answered in the negative, is the question rendered irrelevant by application of the principle that a Court may refuse to review a determination by duly constituted public bodies taking certain land for purposes of urban renewal?

Constitutional Provision Statute and Rules Involved.

This topic is adequately presented in the petition.

Statement.

On September 11, 1964, Abraham Moskow and others (hereinafter "petitioners") filed a bill for declaratory relief [1] in the Superior Court of Massachusetts (R. 11). The bill was prolix, ambiguous, and complicated. Nevertheless, its essential allegations may be summarized as follows:

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[1] Four companion cases were begun almost simultaneously: No. 13,348 and No. 13,349, petitions for common-law certiorari against the City Council of Boston, John J. Carney, and the Boston Redevelopment Authority; No. 6622, a statutory bill in equity; and No. 6623, a petition for judicial review under the Massachusetts Administrative Procedure Act. (The case numbers used in this footnote are those assigned by the Supreme Judicial Court.) The petitioners do not seem to petition for review of these cases, and accordingly they will not be discussed in this brief.

1. The petitioners are owners of property at 10 State Street in Boston (R. 2).

2. On July 23, 1964, the Boston Redevelopment Authority (hereinafter the Authority), a body politic and corporate, took the property at 10 State Street by right of eminent domain (R. 2).

3. The Boston City Council (hereinafter the Council) and the Division of Urban and Industrial Renewal [2] of the Department of Commerce (hereinafter the Division) ostensibly approved the plan (pursuant to which the petitioners' property was taken) on May 25, 1964, and June 24, 1964, respectively. These approvals, however, were not "valid," because hearings held by these bodies were not "full and fair hearings conducted judicially or quasijudicially" (R. 5), and the plan as approved failed to conform to a general plan for the municipality as a whole and violated applicable zoning ordinances (R. 9). Additionally, three members of the Council should have disqualified themselves from voting on the taking because all three had publicly pledged themselves to approve the plan. Two of these three had received "compensation" for their pledges, and, as to the third, a member of his immediate family "was conducting a funeral home" which he was "seeking to relocate . . . within the Area" (R. 7).

4. Although the taking was ostensibly for a public purpose, the petitioners' property was not within a decadent, blighted, or substandard area, and in fact the primary purpose of the taking was to mollify the New England Merchants National Bank. The Authority had indicated that it needed the Bank's nearby property to facilitate access to the Government Center

[2] Its name has been changed by Mass. St. 1964, c. 636, § 6, to the Division of Urban Renewal. See n. 4 of the opinion of the Supreme Judicial Court.

> Project.[3] The Bank disagreed. However, after negotiation among "representatives" of the Bank, the Authority and various other persons, an "understanding" was reached. The terms of this "understanding" were that the Bank would attempt to purchase the petitioners' property and, if the petitioners refused to sell, the Authority would take the property, and the Bank, by one means or another, would obtain the use of this land for an office building. In view of this "understanding" the Bank withdrew its objection to the taking of its own property to facilitate access to the project (R. 3-5).

In their bill the petitioners prayed (*inter alia*) that on the foregoing facts the taking of their property be adjudged "illegal and nullity" (R. 10).

To the bill all the defendants demurred (R. 11, 14, 16, 18, 21), and all demurrers were sustained (R. 12, 14, 17, 19, 21). From interlocutory appeals sustaining the demurrers the plaintiffs appealed to the Supreme Judicial Court (R. 13, 15, 18, 20, 22). The case, together with its companions, was argued on April 9, 1965, and decision was handed down on August 17, 1965. *Moskow* v. *Boston Redevelopment Authority,* 1965 Mass. Adv. Sh. 1203.

Mr. Chief Justice Wilkins's opinion considered the allegations of the bill at length. Quoting from *Comerford* v. *Meier,* 302 Mass. 398, 402, he said (p. 1211):

> "No intendment in favor of the pleader can be made upon a demurrer. *It admits allegations of fact well pleaded* but does not admit inferences from such facts

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[3] The bill makes no effort to describe clearly the geographical relationship of this project to the petitioners' property or to that of the Bank. Actually, the petitioners' property is contiguous with the property taken for the project (R. 5-6).

unless they are necessary inferences. It does not admit conclusions of law from facts averred." (Emphasis supplied.)

Taking the allegations as true, the Supreme Judicial Court held that there was a controversy between the plaintiffs and the defendants except for the Bank and one Andrew Hunter,[4] whose demurrers were sustained (p. 1218). As to the other defendants, the Court overruled their demurrers, but, finding that facts alleged in the bill did not support the conclusion that the taking was illegal or nullity, ordered the entry of a negative declaration (p. 1218).

After rescript from the Supreme Judicial Court, the petitioners applied to this Court for a stay of proceedings that would in effect have prevented the Boston Redevelopment Authority from continuing further with its plans for the petitioners' property pending filing and determination of a petition for certiorari.[5] Mr. Justice Clark turned down this application with the notation: "Under *Berman* v. *Parker*, I see no merit in the contention. See 348 U.S. 26, 34-35."

The petitioners in that application did not attack the state decision on any substantive federal grounds; they contended merely that the decision ordering the declaration on their pleading violated the requirements of due process of law embodied in the Fourteenth Amendment to the

---

[4] Since no answer was filed by any of the defendants, the Court may well have concluded that the failure of the defendants, except for Hunter and the Bank (R. 19, 21), to raise in their demurrers any question as to the existence of a controversy constituted an admission that there was a controversy between the plaintiffs and these parties. *Woods* v. *Newton*, 1965 Mass. Adv. Sh. 989, 995.

[5] This stage of the proceedings, of course, does not appear in the record from the Supreme Judicial Court, but, presumably, is a proper matter for judicial notice by this Court. Wigmore on Evidence, § 2579 (p. 570, v. IX) (3d Ed.).

United States Constitution. This is the sole contention of their present petition.

Argument.

I. THE GROUND ARGUED BY THE PETITIONERS TO OBTAIN REVIEW BY CERTIORARI IS WITHOUT MERIT BECAUSE NO SUBSTANTIAL FEDERAL QUESTION IS RAISED; THE RESCRIPT FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS ORDERING THE SUPERIOR COURT TO ENTER A DECLARATION ON THE PETITIONERS' BILL DOES NOT VIOLATE ANY CONCEIVABLE REQUIREMENT OF DUE PROCESS OF LAW OR ANY OTHER PROVISION OF THE CONSTITUTION OF THE UNITED STATES.

The Supreme Judicial Court of Massachusetts, interpreting the Massachusetts "Procedure for Declaratory Judgments" (adapted from the Uniform Declaratory Judgment Act), G.L. c. 231A, frequently has stated that, on a bill for declaratory relief, the trial Court should not sustain a demurrer merely because it disagrees with the proposition for which the petitioner contends, but should enter a negative declaration. In addition to the cases cited by the Court on page 19 of its opinion, this proposition has also been stated in *School Committee of Cambridge* v. *Superintendent of Schools of Cambridge,* 320 Mass. 516, 520; *Burnes* v. *Metropolitan District Commission,* 325 Mass. 731, 735; *Zaltman* v. *Daris,* 331 Mass. 458, 462; *Morgan* v. *Banas,* 331 Mass. 694, 698; *James Construction Co., Inc.,* v. *Commissioner of Public Health,* 336 Mass. 143, 145; and *Stow* v. *Pugsley,* 1965 Mass. Adv. Sh. 925, 926.[6] It may be that normally a bill for declaratory relief, taken as true, would be insufficient to show that the petitioner is *not* entitled to the declaration requested. In such cases the filing of an

[6] This is only a partial list of cases in which the proposition has been set forth.

answer and the hearing of evidence would be necessary. See, *e.g.*, *School Committee of New Bedford* v. *Commissioner of Education*, 1965 Mass. Adv. Sh. 1029, 1030-1031. In cases, however, in which the petitioner's bill, taken as true, does not set forth a cause for the issuance of the declaration sought therein, the Court may issue a negative declaration on the face of the pleadings. *Willcutt* v. *Prescott*, 340 Mass. 532, 535.[7] The same rule is followed in certain other jurisdictions. *Essick* v. *Los Angeles*, 34 Cal. 2d 614, 624-625. *Cherryvale* v. *Wilson*, 153 Kan. 510, 511. *German Masonic Temple Assoc.* v. *New York*, 279 N.Y. 452, 457. *Cabell* v. *Cottage Grove*, 170 Ore. 256, 261-262. *Cf. Anderson* v. *Wyoming Redevelopment Co.*, 154 P. 2d 318, 337 (Wyo.): demurrer sustained in case in which Massachusetts probably would have ordered negative declaration.

Of course, in declaratory-judgment cases in which the pleadings show that the petitioner is not entitled to relief, whether a demurrer is sustained or a so-called "negative" declaration is made is purely a matter of state procedure. Either alternative reflects the established precept of Anglo-American law that courts need not hear evidence on matters which can be decided on pleadings. *Souffront* v. *La Compagnie des Sucreries de Porto Rico*, 217 U.S. 475, 487. *Fishburne* v. *Merchants Bank of Point Townsend*, 42 Wash. 473, 476. *First National Bank of Wellston* v. *Conway Road Estates Co.*, 94 F. 2d 736, 738. See 41 Am. Jur. § 335, for collected cases. A similar rule is embodied in Rule 12(c) of the Federal Rules of Civil Procedure. The purposes of the rule are self-evident.

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[7] The petitioners (p. 10) attempt to distinguish *Willcutt* v. *Prescott* by quoting the statement that "there are no facts in dispute." But all that the Court could have meant by that statement was that the defendants had not filed an answer to the plaintiff's bill. Nowhere had the defendant admitted the plainiff's allegations. The record in *Willcutt* v. *Prescott* is printed in Appendix A of this brief.

A case analogous to the case at bar is *Iowa Central Railway Co.* v. *Iowa,* 160 U.S. 389. In that case the Supreme Court of Iowa had granted the plaintiff's motion for an order for judgment on the pleadings, declaring that the defendant's answer "had not shown cause why such order should not be made" (p. 391). This Court answered the contention of the plaintiff in error that due process required a hearing by stating (pp. 393-394):

> "As said by this court, speaking through Mr. Chief Justice Fuller, in *Leeper* v. *Texas,* 139 U. S. 462, 468: 'Law in its regular course of administration through courts of justice is due process, and when secured by the law of the State the constitutional requirement is satisfied.' There was a 'regular course of administration' in the case at bar, as that term was employed in the case cited.
>
> "It is manifest that it was never contemplated by the framers of the Constitution that this court should sit in review, as an appellate court, of such a question as that presented by the record in the case at bar, viz., whether or not the highest court of a State erred in holding that it could rightfully determine from the statements in the pleadings filed by both parties to a controversy pending before it that the averments of an answer set forth no defence to the claim of the plaintiff."

In the present case, as in the *Iowa Central* case, there is no federal question presented under 28 U.S.C. § 1257 (3), involving the procedure followed by the Supreme Judicial Court, and the petition for certiorari must be dismissed.

The petitioners cite the case of *Saunders* v. *Shaw,* 244 U.S. 317, to support their contentions. But that case is

totally inapposite, for there the trial Court had held a hearing on the merits. At that hearing the judge ruled certain of the plaintiff's evidence inadmissible, making it unnecessary for the intervening defendant to present rebutting evidence. Judgment was entered for the defendants,[8] and the state Supreme Court affirmed that judgment. However, on rehearing, that Court decided to accept the evidence which the plaintiff had not been allowed to present at the trial, and thereupon entered judgment for the plaintiff. A second rehearing, sought by the defendants, was denied. This Court reversed, holding that the intervening defendant was entitled under the Fourteenth Amendment to a hearing on his evidence in rebuttal before judgment could be entered against him (p. 319).

No analogy can be drawn between the *Saunders* case and the case at bar. Here evidence was never heard. The petitioners' bill was taken as true and thoroughly examined by the Supreme Judicial Court. The Court decided that the bill did state a controversy against some of the parties. For this reason it reversed decrees sustaining these parties' demurrers. But the Court also found that petitioners' bill *did not* show that they were entitled to the declaration which they sought, but that, in fact, the bill established the contrary proposition. Thus the Court ordered the correct declaration entered. The petitioners now seem to say that due process of law requires that they be given an opportunity to present evidence establishing facts which, if proved, would not entitle them to declaratory, or any other, relief. Or are they saying that they are now entitled to disprove the allegations of their bill and to prove other facts instead? One need not spend time pondering the petitioners' position, for clearly the grounds of their application in this Court are absurd.

---

[8] Including the intervening defendant.

II. SINCE MASSACHUSETTS IS NOT CONSTITUTIONALLY REQUIRED TO PROVIDE ANY FORM OF JUDICIAL REVIEW OF AN ADMINISTRATIVE OR LEGISLATIVE DETERMINATION THAT PROPERTY BE TAKEN BY EMINENT DOMAIN FOR PURPOSES OF URBAN RENEWAL, ANY ERROR THAT THE SUPREME JUDICIAL COURT COULD HAVE MADE IN ORDERING THE DECLARATION AGAINST THE PETITIONERS IS HARMLESS.

Let it be assumed, merely for the sake of argument, that generally it would be unconstitutional for a state Court to order a negative declaration against a party who has not been afforded a hearing on the merits. One may still question: Was that party entitled to any judicial hearing at all?

In the instant case the key to the petitioners' entire argument to the Supreme Judicial Court lay in the allegation that "the property at No. 10 State Street . . . [was not] within a decadent, substandard or blighted open area" (R. 3). If this allegation was false, it is abundantly clear that the Authority had power to take the petitioners' property, whatever its motives for doing so may have been. *Despatchers' Cafe Inc.* v. *Somerville Housing Authority,* 332 Mass. 259, 263-264. See *Electronics Corporation of America* v. *City Council of Cambridge,* 1965 Mass. Adv. Sh. 323, 326-327.

The Supreme Judicial Court, however, has said on numerous occasions that the determination of whether particular property is appropriate for slum clearance or urban renewal is a legislative one on which the Courts may not "second guess the Authority." *Moskow* v. *Boston Redevelopment Authority,* 1965 Mass. Adv. Sh. 1203, 1209, and cases cited. On these issues the state law is synonymous with that laid down by this Court in *Berman* v. *Parker,* 348 U.S. 26, 36, which in turn accords with numerous decisions of this Court that neither the states nor the federal government is required to hold a judicial hearing on the

appropriation of private property to achieve a valid social purpose. *Bragg* v. *Weaver*, 251 U.S. 57, 58-59. *Georgia* v. *Chattanooga*, 264 U.S. 472, 483. *United States* v. *Carmack*, 329 U.S. 230, 247, and cases cited in n. 19.

Like this Court (*Federal Radio Commission* v. *General Electric Co.*, 281 U.S. 464, 469), the Courts of Massachusetts may not review decisions exclusively within the legislative province. *Attorney General* v. *Pelletier*, 240 Mass. 264, 296. But, if the Court had ordered a hearing on the merits in this case, a judicial inquiry into the appropriateness of the petitioners' property for urban renewal could not have been avoided. It is hardly conceivable that this Court would order state judges to hear an issue which it, itself, would not hear. *Berman* v. *Parker*, *supra*. Since, under the rule of *Berman* v. *Parker*, no judicial hearing was required in this case, any error that may have been committed by the state Court was harmless, and thus the request for review by this Court is without merit. *Wilson* v. *North Carolina*, 169 U.S. 586, 594-596.

Conclusion.

For the foregoing reasons, certiorari should be denied.

EDWARD W. BROOKE,
Attorney General,
By DAVID BERMAN,
Assistant Attorney General.

[Appendix follows.]

Appendix A.

Record in Willcutt v. Prescott, 340 Mass. 532.

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

Middlesex, ss. EQUITY No. 2524

PRISCILLA WILLCUTT
and
TABER S. WILLCUTT, Petitioners
vs.
OLIVER PRESCOTT, JR., TRUSTEE
GEORGE A. FINGOLD, ATTORNEY GENERAL
WILLIAM B. WILLCUTT, and
MILDRED W. ROBERTS, Respondents

PETITION FOR DECLARATORY RELIEF

TO THE HONORABLE THE JUSTICE OF THE SUPREME JUDICIAL COURT SITTING WITHIN AND FOR THE COUNTY OF MIDDLESEX

Respectfully represents the Petitioners herein that:

1. They are Priscilla Willcutt, of Newton, in the County of Middlesex, and Taber S. Willcutt, of Needham, in the County of Norfolk.

2. The Respondents are Oliver Prescott, Jr., of New Bedford, Bristol County, Massachusetts, Trustee U/W Mary D. B. Hooper, late of Lowell, in the County of Middlesex, George A. Fingold, the Attorney General of the Commonwealth of Massachusetts, and a necessary party to this petition, William B. Willcutt, of Bayside, State of New York, and Mildred W. Roberts, of Boulder, State of Colorado.

3. Mary D. B. Hooper died on March 29, 1924 testate. A copy of her will is attached hereto and marked "A".[1] Paragraph nineteenth of said will provides in part as follows:

> "All the rest and residue of my estate to my trustee to hold and manage as he may determine for the foundation of a home to be situated in the Town of Cohasset, Massachusetts, for the relief of Aged Protestant Couples financially unable to maintain joint domiciles and without children capable of supporting them, such aged couples to be inhabitants of the Towns of Cohasset, Hingham, Scituate, Norwell, Mansfield, Pembroke, Duxbury and Kingston, all in the Commonwealth of Massachusetts. I direct that precedence may be given to such couples who may be inhabitants of the Town of Cohasset. But, if at any time, there are not sufficient aged couples qualified to be admitted to the home from said towns, I direct that others may be admitted from other towns in the County of Plymouth in the discretion of the trustees or such other governing body as may hold the fund hereby created for this purpose.
>
> Said Home to be called the 'Levi Lincoln Willcutt Home for Aged Protestant Couples' as a memorial to the testatrix father."

4. In 1934 a controversy arose between the then trustee and the then heirs-at-law of Mary D. B. Hooper concerning the construction of paragraph nineteenth of said will of Mary D. B. Hooper which controversy was referred to in an agreement of compromise, hereinafter referred to, as follows:

> "whereas under the terms of the will of said Mary D. B. Hooper the trustee holds the residue of the es-

[1] The will was not printed in the record. See page 21 of this brief.

tate in trust for the foundation of a certain home for the relief of aged Protestant couples; and

Whereas the said residue at the present time consists of securities of an approximate value of $156,647; and

Whereas the heirs have asserted and still assert that it is not possible to carry out the terms of the trust, that the Cy pres doctrine is not applicable, and that the trust fund should accordingly now be distributed among them; and

Whereas the trustee disagrees with these contentions claims the right to hold the fund to await further developments, and in the meantime desires to use a part of the income of the fund for the support of aged Protestant couples in their own homes; and

Whereas the parties now desire to effect a compromise of the said claim of the heirs under the authority of G.L. c. 204, par. 14".

5. On April 11, 1934, John H. Clifford, the original trustee, William B. Willcutt, Levi Willcutt, Charles D. Willcutt, Mildred W. Roberts and the Attorney General entered into a compromise agreement which contained a provision that it was to "become effective if and when it has been approved by decree of the Probate Court for Middlesex County or by decree of the Supreme Judicial Court". A petition for leave to effect a compromise pursuant to General Laws, Chapter 204, Section 14, was filed in the Supreme Judicial Court by said John H. Clifford on May 17, 1934, and a copy of such petition and the compromise agreement are attached hereto and marked "B".[2]

6. No guardian ad litem was appointed to represent future contingent interests as required by said General Laws, Chap. 204, Sections 14 and 16; notwithstanding the fact that no guardian ad litem was appointed to represent fu-

[2] The petition, found on pages 7-12 of the record, is omitted.

ture contingent interests a decree approving said compromise agreement was entered on July 7, 1934, and a copy of such decree is attached hereto and marked "C".[3]

7. A home situated in the Town of Cohasset, Massachusetts for the relief of Aged Protestant Couples was not founded by the original Trustee, nor has it been founded by the Respondent Trustee. The residue of the Mary D. B. Hooper Estate has been used for purposes set forth in said compromise agreement. The Respondent Trustee now states that no home for Aged Protestant Couples will be founded.

8. Charles D. Willcutt, Levi Willcutt and Emma W. Fletcher who were three of the then heirs-at-law of Mary D. B. Hooper and were parties to the compromise agreement, have since deceased. Your petitioners are children of Charles D. Willcutt, who died on January 1, 1952. Levi Willcutt died on February 14, 1949, and left children surviving. They are Harriet Willcutt, Jean Willcutt and Mary Willcutt, all of Wellesley, County of Norfolk, Massachusetts. Emma W. Fletcher also died on February 14, 1949, but left no children surviving. The Respondents William B. Willcutt and Mildred W. Roberts are the only surviving heirs-at-law who were parties to the compromise agreement.

9. The compromise agreement entered into by the then heirs-at-law and approved by the Court pursuant to such compromise agreement is not binding on your petitioners for the reason that they were not parties thereto, nor was a guardian ad litem appointed to represent them. Your petitioners had a future contingent interest and should have been represented by a guardian ad litem to comply with the requirements of General Laws Chapter 204, Section 14.

10. Your petitioners contend that the purpose of the trust under Paragraph Nineteenth of the will of Mary D. B.

---

[3] This decree, found on page 13 of the Record, is omitted.

Hooper is for the foundation of a home in the Town of Cohasset, Massachusetts, for relief of Aged Protestant Couples and to be called the "Levi Lincoln Willcutt Home for Aged Protestant Couples", as a memorial to the testatrix father. The trust has failed because the specific charitable purpose intended by the testatrix has not been carried out or accomplished thereby terminating the trust and the trust property should now be distributed to the present heirs-at-law of Mary D. B. Hooper as intestate property.

11. An actual controversy has arisen between the parties to this proceeding within the meaning of section 1 of Chapter 231A of the General Laws.

12. Although he has been requested to do so, the Respondent Trustee has failed or neglected to bring a petition for instructions or a proceeding within the meaning of section 1 of Chapter 231A of the General Laws to ascertain

(a) Whether the compromise agreement and decree is binding on the petitioners; and

(b) Whether the charitable trust was specific or general; and

(c) Whether the doctrine of cy pres is applicable and has been legally accomplished.

This petition is brought for that purpose.

13. The petitioners bring this petition in behalf of themselves and all other heirs-at-law of Mary D. B. Hooper, who were not parties to the compromise agreement and who may desire to join therein or who are parties thereto to establish a resulting trust in the trust property held by the Respondent Trustee under paragraph nineteenth of the will of the testatrix.

Wherefore, your petitioners pray:

1. That this Court make a binding declaration that the compromise agreement dated April 11, 1934, and the decree of this Court dated July 7, 1934, approving said compro-

mise agreement did not comply with General Laws, Chapter 202, Sec. 14 and 16, and is not binding on your petitioners.

2. That this Court make a binding declaration that Mary D. B. Hooper under paragraph nineteenth of her will, intended the specific charitable purpose described therein and did not intend any general charitable purpose.

3. That this Court make a binding declaration that the trust under paragraph nineteenth of the will of Mary D. B. Hooper has not been carried out as intended and has failed.

4. That this Court make a binding declaration that the Respondent Trustee now holds the trust property under a resulting trust for the benefit for the present heirs-at-law of Mary D. B. Hooper and is now distributable to them as intestate property of the testatrix.

5. That this Court grant such further relief as to it may seem meet and proper.

PRISCILLA WILLCUTT
TABER S. WILLCUTT
By their Attorneys
William A. Cross
Arthur M. Beale

. . . . . .

DEMURRER TO PETITION FOR DECLARATORY RELIEF.

The respondents Oliver Prescott, Jr., as Trustee under the will of Mary D. B. Hooper, and William B. Willcutt demur to the petition for declaratory relief upon the following grounds:

(a) The petition states no facts forming a basis for a declaratory judgment or degree [*sic*].

(b) It appears by the petition that the subject matter of the petition and the matter as to which a declaratory decree is sought were conclusively settled by the final decree

of the Supreme Judicial Court entered on July 7, 1934, as to all parties having any interest in the residue of the estate of Mary D. B. Hooper.

(c) It appears by the petition that neither of the petitioners is named in the will of Mary D. B. Hooper or was an heir-at-law or next of kin of Mary D. B. Hooper at the time of her death or at the date of the agreement of April 11, 1934, or the entry of the decree on July 7, 1934, and at none of said times did either of them have any interest in the residue of her estate or any future contingent interest in her estate.

(d) It appears that one of the heirs-at-law and next of kin of Mary D. B. Hooper was the father of the petitioners, that he executed a compromise agreement on April 11, 1934, that he was then of full age and sound mind, and that by virtue of the execution of said agreement and the entry of said final decree, he accepted the provisions of said agreement in full satisfaction of all claims with respect to the residuary estate of Mary D. B. Hooper, and that the residue of said estate has been used for the purposes set forth in said compromise agreement.

(e) It appears from the facts alleged in the petition and particularly the decree entered on July 7, 1934, that there was no occasion for appointing a guardian ad litem to represent the petitioners in the proceeding in which final decree was entered by the Supreme Judicial Court on July 7, 1934, approving the compromise agreement set forth in the petition.

By their attorney,

Filed Jan. 28 1957 CLAUDE R. BRANCH

DEMURRER TO PETITION FOR DECLARATORY RELIEF

The respondent, Mildred W. Roberts, hereby demurs to the petition for declaratory relief upon the grounds set

forth in the demurrer of the respondents, Oliver Prescott, Jr., as trustee under the will of Mary D. B. Hooper, and William B. Willcutt.

By her attorney,
CLAUDE R. BRANCH

Filed Apr-1 1957

DEMURRER OF ATTORNEY GENERAL

Now comes Edward J. McCormack, Jr., as he is the Attorney General of the Commonwealth of Massachusetts, and demurs to the petition for declaratory relief on the ground that the petition fails to set forth with substantial certainty sufficient facts which would entitle the petitioners to declaratory relief.

EDWARD J. MCCORMACK, JR., Attorney General
By Richard H. Gens
Assistant Attorney General

Filed in Court April 8 1959 by leave of Court (Ronan, J.) sitting at Boston

CHESTER A. DOLAN JR.

INTERLOCUTORY DECREE SUSTAINING DEMURRERS

This cause came on to be heard and was argued by counsel and thereupon, upon consideration thereof, it is ordered, adjudged and decreed that the demurrers of all the respondents be and the same hereby are sustained.

By the Court sitting at Boston, (Ronan, J.)

CHESTER A. DOLAN JR.

Entered: April 23, 1959
(April 27, 1959)

APPEAL OF PLAINTIFFS

Now come the Plaintiffs, in the above entitled cause and make an appeal to Supreme Judicial Court for the Commonwealth from the order of the Court sustaining defendant's demurrers.

By their attorney,
ARTHUR M. BEALE

Filed May 11 1959

FINAL DECREE DISMISSING THE PETITION

The cause came on to be heard at this sitting and was argued by counsel; and thereupon, upon consideration thereof, the Court (Ronan, J.) having sustained the demurrers of the defendants to the petition, it is ordered, adjudged and decreed that the petition be and it now is dismissed.

By the Court, (Spalding, J.)
July 22, 1959

CHESTER A. DOLAN JR.
Clerk.

The petitioners consent to the form of this decree without waiving right to appeal.

ARTHUR M. BEALE
Attorney for the petitioners

Assented to:

EDWARD J. MCCORMACK, JR.,
Attorney General
By Richard H. Gens
Assistant Attorney General

CLAUDE R. BRANCH
Attorney for respondents

APPEAL OF PLAINTIFFS FROM FINAL DECREE

Now come the Plaintiffs in the above entitled cause, and make an appeal to the Supreme Judicial Court for the Commonwealth for the Final Decree Dismissing the Petition of the Plaintiffs.

By their Attorney,
ARTHUR M. BEALE

Filed July 29 1959

AGREEMENT RE PRINTING EXHIBITS ATTACHED TO PLAINTIFFS' PETITION

It is hereby agreed that Exhibit "A" (Will of Mary D. B. Hooper) shall not be printed nor used as an exhibit at the argument before the Full Court; and that Exhibit "B" and "C" attached to Petitioners' Petition shall be printed in the record.

ARTHUR M. BEALE
Attorney for Petitioners
DANIEL F. FEATHERSTON JR.
Attorney for Respondents
EDWARD J. McCORMACK JR.
Atty. General
By Richard H. Gens
Ass't Atty. General.
Attorney General per Hc.

Filed at Boston Oct-7 1959 and approved by the Court (Ronan, J.) sitting at Boston.

The foregoing are true copies.

Attest: CALVIN A. BURGER
Assistant Clerk

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Office-Supreme Court, U.S.
FILED
DEC 13 1965
JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

October Term, 1965

No. 745

Abraham Moskow, Jay L. Moskow, Harry Moskow and Myer Moskow,

Petitioners,

v.

Boston Redevelopment Authority, Christopher I. Lanzilla, George F. Foley, William J. Foley, Frederick C. Lawson, John J. Tierney, Jr., Barry Hynes, John E. Kerrigan, Peter F. Hines, and Katherine Craven, as they are Members and constitute the City Council of Boston, The Division of Urban and Industrial Renewal, John J. Carney, as he is the Temporary Director of the Division of Urban and Industrial Renewal, The City of Boston, New England Merchants National Bank of Boston, and Andrew A. Hunter,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Judicial Court of Massachusetts

BRIEF FOR BOSTON REDEVELOPMENT AUTHORITY IN OPPOSITION

John C. Conley
73 Tremont Street
Boston, Mass. 02108
Lawrence A. Sullivan
Foley, Hoag & Eliot
10 Post Office Square
Boston, Mass. 02109
Of Counsel

Lewis H. Weinstein
Loyd M. Starrett
Verrie W. Vance, Jr.
10 Post Office Square
Boston, Mass. 02109
Attorneys for Boston Redevelopment Authority

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In the

Supreme Court of the United States

OCTOBER TERM, 1965

No. 745

ABRAHAM MOSKOW, JAY I. MOSKOW, HARRY MOSKOW and MYER MOSKOW,

PETITIONERS,

v.

BOSTON REDEVELOPMENT AUTHORITY, CHRISTOPHER I. IANNELLA, GEORGE F. FOLEY, WILLIAM J. FOLEY, FREDERICK C. LANGONE, JOHN J. TIERNEY, JR., BARRY HYNES, JOHN E. KERRIGAN, PETER F. HINES, and KATHERINE CRAVEN, as they are Members and constitute the City Council of Boston, THE DIVISION OF URBAN AND INDUSTRIAL RENEWAL, JOHN J. CARNEY, as he is the Temporary Director of the Division of Urban and Industrial Renewal, THE CITY OF BOSTON, NEW ENGLAND MERCHANTS NATIONAL BANK OF BOSTON, and ANDREW A. HUNTER,

RESPONDENTS.

On Petition for a Writ of Certiorari to the Supreme Judicial Court of Massachusetts

BRIEF FOR BOSTON REDEVELOPMENT AUTHORITY IN OPPOSITION

Boston Redevelopment Authority, one of the respondents herein, respectfully submits the following in opposition to

the Petition for a Writ of Certiorari filed November 15, 1965:

Question Presented

The Petition raises no question as to the constitutionality of the Massachusetts procedural rule applied in the present case—that, when proof of all well-pleaded allegations of the bill would not entitle petitioners to the declaration requested but nevertheless those allegations do set forth a controversy within the Massachusetts declaratory judgment statute, technically the case should be disposed of not by sustaining demurrers (as the trial court had done initially in the present case) but rather by entry of a declaration adverse to petitioners. Indeed, no such question could be raised, for the Fourteenth Amendment certainly does not preclude a state court's assuming a party's allegations to be true and ruling against him if such a ruling is required as a matter of law upon those allegations assumed to be true. Thus basing a declaratory decree adverse to a plaintiff's contention on the plaintiff's own allegations is in substance no different than the sustaining of a demurrer in an ordinary case for coercive relief where the well-pleaded allegations of the complaint do not set forth a case for the relief prayed.

The sole question the Petition does present is whether petitioners' constitutional rights were somehow infringed because they had inadequate notice that this admittedly constitutional Massachusetts procedural rule might be applied to their case. (Pet. 8) [1]

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[1] The Petition for a Writ of Certiorari and the Appendices thereto are cited herein, respectively, as Pet. and Pet. App. Certain materials which are not reproduced in any appendix to the Petition or in the appendix to this Brief are cited herein by reference to the printed Record ("R.") which was before the court below and is part of the certified record filed in this Court.

Statement

The Petition challenges the decision of the Supreme Judicial Court of Massachusetts with respect to one of five different proceedings brought by petitioners and their predecessor in title to certain property in Boston (an office building known and numbered as 10 State Street) wherein they challenge the inclusion of that property in the Government Center Urban Renewal Project of the Boston Redevelopment Authority (hereinafter sometimes referred to as, respectively, the "Project" and the "Authority"). The bill in equity which commenced the proceeding involved in the Petition was brought against respondents herein more than a year ago in the Superior Court of The Commonwealth of Massachusetts within and for Suffolk County. It prayed both a declaration that the taking by eminent domain of No. 10 State Street by the Authority for the Project was illegal and an injunction restraining the Authority from "evicting or otherwise interfering with the tenants . . . at 10 State Street" or demolishing the building there. (R. 10)

The basic allegation in the bill was that the taking of petitioners' property for the Government Center Urban Renewal Project was not for a public purpose but rather was for the purpose of enabling Cabot, Cabot & Forbes, a private developer, to construct a new building of which the principal tenant was to be the respondent New England Merchants National Bank of Boston (R. 2-4). The bill attacked the action of the City Council of Boston (R. 5-8) and of the Massachusetts Division of Urban Renewal (R. 9) in approving the Government Center Urban Renewal Project while it included petitioners' property and also attacked the activities of the respondent Hunter, who was alleged to have served as treasurer for a slate of candi-

dates for the Boston City Council who had pledged that, if elected, they would vote for the Government Center Urban Renewal Plan (R. 6-8).

Each of the respondents demurred to the bill (R. 11-12, 14, 16-17, 18-19, 21) without filing an answer; the grounds specified by the Authority's demurrer, in particular, included the facts that petitioners had "not alleged such a cause as entitles them to any relief in equity" against the Authority and, more generally, that the "Bill fails to set forth facts sufficient to warrant relief" to petitioners as well as that petitioners had "not stated in said Bill such a cause as entitles them to any relief against said defendant [the Authority] by way of declaratory decree." (R. 11-12) The Superior Court, after hearing, entered interlocutory decrees sustaining each of the demurrers (R. 13-14, 17, 20, 21) and a final decree dismissing the bill (R. 23). Petitioners thereafter appealed from all of those decrees (R. 13, 15, 18, 20, 22, 23), and all parties filed briefs on those appeals in the Supreme Judicial Court of Massachusetts. Petitioners' brief in that court, assuming the truth of all factual allegations of their bill, argued strenuously that those allegations established their contention that the taking of their property was invalid because the property was taken for private purposes and because important safeguards required by law were violated or omitted in connection with the taking. (See Appendix A *infra*, where the "Summary of Argument" of petitioners' brief in the Supreme Judicial Court is reproduced.)

On August 17, 1965, the Supreme Judicial Court handed down its opinion in which it upheld the decrees sustaining the demurrers of the respondent Bank and respondent Hunter, on the ground that the bill stated no controversy as to them, and held that the well-pleaded allegations of the bill set forth no basis for issuance of the declaratory

decree requested by petitioners. However, pursuant to the rule of Massachusetts practice applied in a number of prior cases (*e.g., Willcutt* v. *Prescott,* 340 Mass. 532), a declaratory decree adverse to the plaintiff rather than a decree sustaining the demurrer should be entered in a case where the defendant has demurred to a complaint for declaratory relief and the court concludes that, although the complaint sufficiently alleges a controversy within the declaratory judgment statute and thus is not technically demurrable, the well-pleaded allegations of the bill do not justify the declaration sought. Thus, the Court held, the proper disposition of the present case as to the other respondents was the entry of a declaration that the taking of the petitioners' property by the Authority was not illegal and was not a nullity. (Pet. App. 29)

There is no provision for rehearing by the Supreme Judicial Court of Massachusetts, but by custom one may request a rehearing informally by letter. On August 30, 1965, petitioners wrote to the Chief Justice of the Supreme Judicial Court requesting a rehearing with respect to whether such a declaration should be entered and arguing that petitioners had no opportunity to be heard on the question of what declaration should be entered. (Pet. App. 40-42) This request for rehearing was considered by the full Supreme Judicial Court and expressly denied on October 4, 1965. (Pet. App. 43)

Petitioners also applied to the court below for a stay of, among other things, the Authority's "taking any further steps to dismantle or demolish the building at 10 State Street"; that application was denied on September 17, 1965. Thereafter, petitioners sought a similar stay from this Court. The latter application was denied by Mr. Justice Clark on September 20, 1965 with the following endorsement: "Under Berman v. Parker, I see no merit in the contention. See 348 U.S. 26, 34-35."

Argument

Manifestly the question raised by the Petition is a narrow one which is limited to the interest of these particular petitioners in this particular litigation and presents no important question of federal law for resolution by this Court. Petitioners raise here only the issue whether, prior to the decision by the Massachusetts court in the present case, petitioners had sufficient notice of the Massachusetts procedural rule that, on a demurrer to a bill in equity for declaratory judgment, the issue is open whether or not the well-pleaded factual allegations of the bill would—if all proved—entitle the plaintiff therein to a declaration in its favor and that if the court resolves that issue in the negative it can enter a declaration adverse to the plaintiff.

Obviously that question is a rather technical matter of Massachusetts procedural law which has no general importance. And—even if the procedural rule in question had not been applied in earlier cases so that there might have been a lack of notice as petitioners allege—the issue presented by the Petition still would not have any future importance even in Massachusetts, for in any event the present case would give future litigants ample notice of that rule.

Moreover, petitioners' procedural objections are hollow; there is no substance behind them. Petitioners' request for declaratory relief is but one more in the long series of attacks upon the validity of urban renewal projects by persons who disagree with the Authority and the other responsible public agencies and seek to substitute their judgment for that of the Authority and such agencies. Because petitioners' bill in equity is based upon an aggregation of time-worn grounds which really do not differ substantially from those rejected by prior decisions of the Massachusetts

Supreme Judicial Court—the constitutional validity of which is unquestionable pursuant to the unanimous landmark decision of this Court in *Berman* v. *Parker,* 348 U.S. 26—it is clear that petitioners would be unable to obtain the declaration they seek even if they were "heard" time and time again.

Furthermore, it is difficult to believe that petitioners were surprised, because earlier Massachusetts cases in fact applied the procedural rule in question. Finally, even if petitioners were surprised, they were not prejudiced by any such surprise, for, as the Summary of Argument in petitioners' brief to the court below (reprinted in Appendix A, *infra)* indicates, petitioners in fact presented to that court at length their arguments in support of their contention that upon the facts they alleged they were entitled to a declaratory decree that the taking of their property by the Authority was invalid. In short, petitioners had—and took full advantage of—an opportunity to be heard with respect to the issue of what declaration should be entered upon the facts alleged in petitioners' bill in equity.

I. The question the Petition presents is not of practical significance.

A. *The issue raised involves only Massachusetts procedure and will not recur even in Massachusetts.*

Plainly the question presented by the Petition is a narrow one. Indeed, it appears to be relevant only to the procedural law of one state, for certainly declaratory judgment statutes and practices vary greatly from state to state—even among states where such statutes or practices exist—and the Petition does not demonstrate that the question petitioners seek to present to this Court has any relevance in any other state. Obviously it could have no

such relevance, for the question whether or not petitioners had sufficient notice of the particular procedural rule involved is purely a question of local Massachusetts law—in other words, whether the technical procedural rules applied in the present case were in accordance with Massachusetts law and precedent.

Moreover, a decision of the question raised by the Petition would not have any particular significance even for future litigants in Massachusetts. Regardless of what the procedural rule applied by earlier decisions may have been —even if were not true that, as is hereinafter demonstrated (see pages 10-12, *infra*), such decisions made clear the procedural rule applied in the present case—the decision in the present case unquestionably sets forth the relevant procedure clearly and unambiguously. For purposes of future litigation the decision in the present case will constitute ample notice of the applicable procedural rule.

B. *The issue raised cannot result in a practical benefit even to petitioners in the present case.*

Even if petitioners were given an additional opportunity to be "heard" — or even two or three such opportunities —they could gain no ultimate benefit, because the decisions of this Court and pertinent Massachusetts decisions with respect to the substantive law governing the urban renewal process clearly establish that even if petitioners could prove every factual allegation of their bill in equity they would not be entitled to the declaration they seek. Petitioners simply take issue with the decision of the Authority regarding the boundaries of the urban renewal project, question the motives of the Authority when it drew those boundaries, argue with the Authority's determination that the project area was substandard and decadent, and dispute the decisions, made by the several agencies charged by statute

with the responsibility for reviewing urban renewal plans, that the Government Center Urban Renewal Plan was sufficiently complete. The court below carefully considered all those matters and correctly concluded from an unbroken line of Massachusetts decisions that none of those matters is subject to judicial re-examination in the absence of specific factual allegations of fraud or bad faith, of which there were none in petitioners' bill in equity. See, *e.g.*, *Bowker* v. *Worcester,* 334 Mass. 422; *Stockus* v. *Boston Housing Authority,* 304 Mass. 507; *Worcester Knitting Realty Co.* v. *Worcester Housing Authority,* 335 Mass. 19; *Despatchers Cafe* v. *Somerville Housing Authority,* 332 Mass. 259; *Papadinis* v. *Somerville,* 331 Mass. 627.

The view of the law established by those Massachusetts decisions accords with the landmark decision of this Court in *Berman* v. *Parker,* 348 U.S. 26, in which this Court unanimously upheld the constitutionality of the taking of land for an urban renewal project in the District of Columbia against attacks similar to those in petitioners' bill in equity. It is significant that the present Petition in no way challenges the substance of the decision below; indeed, petitioners hasten to disclaim any disagreement with the principles laid down in *Berman* v. *Parker* (Pet. 11).

In these circumstances, the question presented by the Petition obviously is only a minor procedural matter and even if these petitioners could ultimately prevail on the merits as to that matter it would not be a meaningful victory. In other words, this is truly that rare case presenting an issue the resolution of which cannot be of practical value to anyone, even to the petitioners.

II. In any event, the issue raised by the Petition does not merit the attention of this Court.

A. *Prior decisions of the court below clearly established the relevant procedural rule.*

Petitioners' claim that their counsel had no notice of the relevant procedure and consequently they were deprived of "the opportunity to be heard" with respect to the question of "what declaration should be entered" (Pet. 9) ignores the teaching of prior decisions of the Massachusetts Supreme Judicial Court. Those decisions had made clear beyond any doubt that Massachusetts practice required entry of a declaratory decree adverse to the plaintiff in cases where defendant had demurred to a bill for declaratory relief and the court concluded that, although the petition sufficiently alleged a controversy within the declaratory judgment statute and thus was not technically demurrable, as a matter of law even if every well-pleaded allegation of the bill were proved the plaintiff would not be entitled to the declaration sought. See, e.g., *Foley* v. *Springfield,* 328 Mass. 59, 62-63; *Vasilakis* v. *Haverhill,* 339 Mass. 97, 101; *County of Dukes County* v. *New Bedford, etc., Steamship Authority,* 333 Mass. 405, 406; *Willcutt* v. *Prescott,* 340 Mass. 532; *Trustees of Reservations* v. *Stockbridge,* 1965 Mass. Adv. Sh. 265.

Petitioners attempt to distinguish those cases, in all of which the procedural rule involved in the present case was applied and consequently on demurrers to petitions for declaratory relief the demurrers were overruled and negative declarations were entered instead, by saying that they are all cases where the facts were not "in dispute". But those cases cannot be so distinguished, for patently when the plaintiff would not be entitled to relief even if all facts alleged by the plaintiff were proved there is no *material*

fact "in dispute". Moreover, at least in *Willcutt* v. *Prescott, supra,* the procedural posture was precisely the same as that in this case. In *Willcutt* as in the present case, the defendant had filed only a demurrer to a petition for declaratory judgment and nothing more and that demurrer had been sustained by the trial court. The Supreme Judicial Court ordered that the demurrer be overruled and a declaration adverse to the plaintiff be entered instead, holding as follows:

> "On the *asserted* facts the agreement and decree are in full force and effect and bar the examination asked by the plaintiffs to determine if error underlay them . . . . The decree which sustained the demurrers reflects the correct determination that no declaration in favor of the plaintiffs can be made on the *averments* of the plaintiffs. But we think it cannot be ruled as that decree necessarily does that the plaintiffs have failed to state a case presenting a controversy proper for determination under the declaratory procedure. The allegation of controversy is in general terms only but it is implicit that the parties are in issue in respect of the plaintiffs' contentions. This is therefore the usual case in which a declaratory decree should be made . . . . There are no facts in dispute and there is no occasion for a hearing. The decisive issue has been presented in full." 340 Mass. at 534-35. (Emphasis added.)

Inasmuch as the defendant in that case had filed no pleading other than a demurrer and there was no agreed statement of facts, the court's comment that there were "no facts in dispute" can only mean that no facts material for purposes of testing the sufficiency of the petition were disputed. That was so, of course, because on a defendant's demurrer the plaintiff's well-pleaded factual allegations

are always deemed to be admitted—as the court confirmed by using such phrases as "asserted facts" and the "averments of the plaintiffs".

In short, *Willcutt* v. *Prescott* was procedurally like the present case in every respect and constituted a clear precedent directly in point as to the procedural rule applied in the present case. There can be no question that the *Willcutt* case, in conjunction with the other cases hereinbefore cited, fairly put petitioners on notice that defendants' demurrer raised, among others, the issue whether a declaration adverse to plaintiffs should be entered on the basis of the allegations of plaintiffs' bill in equity.[2]

B. *Petitioners fully argued before the court below the question of what declaration should be entered upon the allegations of their bill.*

That petitioners were in fact aware that the question of what declaration should be entered was before the court below is manifest from their brief in that court.[3] In that brief petitioners argued far more than the question whether they had alleged a controversy as to which some declaration should be entered. Indeed, almost all of that brief is devoted to argument that the allegations of their bill entitled them to the specific declaration they requested—or, in the words of the first paragraph of petitioners' Summary of Argument, to their contentions, "first, that their property was taken for the private purposes of the Bank . . . and, second, that important safeguards required by law

---

[2] Moreover, the demurrers alleged that petitioners' bill in equity failed to state "such a cause as entitles them to any relief". (R. 11-12; see p. 4 *supra*) In other words, the demurrers in the present case expressly put in issue the question whether proof of all well-pleaded allegations of their bill in equity would entitle petitioners to the declaration requested.

[3] That argument is summarized—in petitioners' own words—in the Summary of Argument which was part of their brief to the court below and is reproduced as Appendix A *infra*.

were violated or omitted in connection with the taking." (p. A-1 *infra*) Thus petitioners' argument that they were not "heard" on the question of what declaration should be entered on the facts alleged by them is pure fancy. Petitioners have argued at great length that—upon the facts alleged in their bill—the urban renewal process was abused in the present case and the taking of their property in connection with that process was therefore invalid. Petitioners already were heard on the issue of what declaration should be entered, and their Petition to this Court is a transparent attempt to obtain not one but many days in court.

Conclusion

For the reasons stated, the Petition for writ of certiorari should be denied.

Respectfully submitted,

LEWIS H. WEINSTEIN
LOYD M. STARRETT
VERNE W. VANCE, JR.
10 Post Office Square
Boston, Massachusetts 02109

JOHN C. CONLEY
73 Tremont Street
Boston, Mass. 02108
General Counsel,
Boston Redevelopment Authority

Attorneys for
Boston Redevelopment Authority

LAWRENCE A. SULLIVAN
FOLEY, HOAG & ELIOT
10 Post Office Square
Boston, Massachusetts 02109
Of Counsel

December 13, 1965

Appendix A

The following is quoted from petitioners' Brief to the court below (pages 10-13):

"SUMMARY OF ARGUMENT

"The appellants in these cases challenge, not the urban renewal process, but an abuse of the urban renewal process. Their contention is, first, that their property was taken for the private purposes of the Bank (pp. 14-21); and, second, that important safeguards required by law were violated or omitted in connection with the taking. (Pp. 42-52.)

"We deal at the outset with the substantive principle that private property cannot be taken by eminent domain for a dominantly private purpose. (P. 14.) Often there is difficulty in framing a comprehensive definition of public purpose, but we show that problems involved in questions of excess condemnation or mingled public and private uses are magnified and aggravated by the urban renewal program. (Pp. 15-17.)

"The issue specifically is whether 10 State Street could be included in the Government Center project area solely for the benefit of the Bank and CC&F. (P. 19.) While BRA concededly has discretion in site selection, canalized within the statutory context, yet the circumstances here alleged, where the Bank attempted to buy 10 State Street for itself pursuant to its understanding with BRA, failed, and now is the beneficiary of the taking pursuant to the understanding, are an abuse of that discretion. (Pp. 18-19.)

"Closely entwined with substantive principles in the field of municipal jurisprudence are problems of reviewability. (Pp. 21-28.) The appellants see no reason in the public interest for the Courts to foreclose inquiry on the issue of the purpose of a taking. Compare *Village on the Hill,*

[Appendix A: "Summary of Argument" quoted from petitioners' Brief to the court below]

Inc. v. *Massachusetts Turnpike Authority,* 1964 Advance Sheets 1245. (Pp. 21-26.)

"We advance what we believe are cogent reasons for courts to be particularly careful in the situation of urban renewal (pp. 21-22), and we note cases, one in Connecticut and another in Kansas, where similar problems have been examined by courts in the urban renewal field. (P. 24 and p. 27.)

"As to specific review procedures, aside from the omnibus bill, which is partly covered by what has already been said, there are two petitions for certiorari—Nos. 593464 and 594464—one bill in equity raising issues under G. L. c. 268A, and one petition for review against the Division under G. L. c. 30A.

"In general as to both of the certiorari petitions, we argue that the proceedings sought to be reviewed include questions of purpose and compliance with statutory requirements and are judicial in nature. (Pp. 28-31.) As to both the Council and the Division, the administrative function is approval, not the actual delineation of the project area, and approval implies a judicial function. (P. 30.) This Court has already observed, as we understand its language, that substantially similar urban renewal proceedings are reviewable by certiorari. (P. 31.)

"The demurrer in No. 593464 is based on exhaustion of remedies. The short answer to this is that there are no other remedies that could be exhausted where the precise issues raised by No. 593464 relative to the Council could be raised before another governmental or administrative tribunal. (Pp. 34-35.) The recent NASA case, where the Cambridge redevelopment project is still in the study stage, is not authority to the contrary. (P. 35.)

[Appendix A: "Summary of Argument" quoted from petitioners' Brief to the court below]

"The exhaustion doctrine, significantly, is not invoked in No. 82572 Equity, which also seeks to review the qualification or disqualification of three members of the Council. To the argument that is made, that G. L. c. 268A does not authorize the suit to be brought, the appellants respond that the provisions of section 21(a) of that chapter and consideration of public policy support maintenance of the bill. (Pp. 37-38.)

"There are two proceedings against the Division because of the ambiguity of the provisions for a public hearing in G. L. c. 121, sec. 26KK. If this section does not apply—in other words, if the plan is an urban renewal plan subject solely to the procedures of section 26ZZ of that chapter—certiorari is an appropriate remedy in view of the provision for approval by the Division and the existence of certain statutory prerequisites. (Pp. 38-39.) On the other hand, if section 26KK does apply, then the proceeding is adjudicatory under G. L. c. 30A. (P. 40.) Applicability of section 26KK is suggested by the fact that the Division held a hearing required only by that section, and by the literal applicability of the statutory provision. (P. 40.)

"In the proceedings against the Council, as well as in the omnibus bill, disqualification of certain Council members invalidates the 1964 vote. Three members of the Council, by pledging themselves to vote to include Parcel 8, without hearing the evidence, tended to reduce the public hearing before the Council to an empty form. (Pp. 43-44.) Another irregularity was that Langone's vote, essential to the five-four vote of 1964, was affected by the financial interest of his immediate family in a funeral home in the project area. This interest, and certain contributions received by two other members of the Council, violated the spirit and letter of G. L. c. 268A. (P. 45.) A final reason

[Appendix A: "Summary of Argument" quoted from petitioners' Brief to the court below]

to set aside the Council's 1964 vote is that the Council was bound to respect its determination in 1963 not to include Parcel 8. Various guidelines determine the applicability of administrative *res judicata*, and the present case should be within those guidelines. (Pp. 47-49.)

"Lastly, the taking is conditioned upon the existence of a valid urban renewal program. There are three respects in which the present plan violates section 26ZZ of G. L. c. 121. First, a "general plan for the municipality as a whole" does not exist in Boston. (Pp. 50-51.) Second, necessary zoning changes are not shown on the plan. (P. 51.) And, third, the plan fails to conform to a comprehensive plan for the locality. (P. 52.)

"The first four suits are not moot by virtue of the assignment by State Street to its stockholders. (P. 52.) We assume that the Justice of the Superior Court who sustained the demurrers saw no reason in his discretion to allow the subsequent amendments in these suits relative to parties, since they would not have cured any deficiency upon which the demurrers were claimed to be based. To the extent that the first four proceedings are properly brought, we suggest that the orders denying the addition of parties and amendment for that purpose be vacated, and those cases be remanded."

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OCTOBER TERM, 1965

No. 745

ABRAHAM MOSKOW et al

v.

BOSTON REDEVELOPMENT AUTHORITY et al

REPLY BRIEF FOR PETITIONERS

JAMES W. KELLEHER
Counsel for Petitioners
73 Tremont St.
Boston, Mass.

Of Counsel:
WILLIAM C. MADDEN
EDGAR L. KELLEY

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REPLY BRIEF FOR PETITIONERS

This case, as it now stands on petition, record and opposition briefs, reminds one of an incident in a detective story of an older generation:

> "Is there any other point to which you would wish to draw my attention?"
> "To the curious incident of the dog in the night-time."
> "The dog did nothing in the night-time."
> "That was the curious incident," remarked Sherlock Holmes.[1]

Counsel for defendants now argue that the declaratory judgment we attack was a normal, routine, expectable consequence of a well-established rule of Massachusetts practice. Yet no defendant asked in his brief that the well-

[1] Sir Arthur Conan Doyle, "Silver Blaze," in "The Memoirs of Sherlock Holmes".

established practice be applied in his favor. No one asked that a declaratory judgment be entered. Each was content to ask that the bill be dismissed. (Pet., App. D, pp. 44-46.) That is the curious incident.

Is it credible that five counsel refrained deliberately from seeking relief to which they were entitled under well-established practice?

If, on the other hand, there was no such rule of practice; if, in fact, no counsel had then imagined such a rule, the inaction of counsel is perfectly explicable; indeed, it needs no explanation. The incident ceases to be curious, as did the incident of the dog in the story when all the facts were known.

It strongly appears, we suggest, that the alleged rule of Massachusetts practice was sought for after the event, in the understandable desire to hold on to a treasure which, to the obvious astonishment of counsel, had fallen from the skies. All that the industry and ingenuity of counsel has been able to produce, in support of the alleged rule of practice, is the case of *Willcutt* v. *Prescott,* 340 Mass. 532, in which the plaintiff himself asked the court to enter a declaratory judgment (Pet., App. E, p. 47), and in which the Court itself was able to say in its opinion: "There are no facts in dispute . . ." 340 Mass. 532, 535.[2]

The City of Boston urges that plaintiffs have already been fully heard on the question *what* declaration should enter. But clearly the plaintiffs did not ask the Supreme Judicial Court to enter a declaration that the taking was invalid (Pet., App. D, p. 44) and such a request could not have been granted if they had made it, because that would have unconstitutionally deprived defendants of their right to answer. *Hovey* v. *Elliott,* 167 U.S. 409. The plaintiffs'

[2] It is difficult to believe that the Supreme Judicial Court made this pointed statement without any basis. Probably it is the result of statements of counsel at the oral argument.

problem was to show that they had standing to attack the taking, and that, therefore, the bill should not be dismissed. If, in making out that standing, objections to the taking itself were mentioned, it by no means follows that the plaintiffs were fully heard on that question. If we should allude later in this brief (as we do) to some of the consequences which would occur if this Court reversed the Supreme Judicial Court, we think it does not follow, if the writ should issue, that we are entitled to no further argument. In a case where elaborate findings with respect to the merits of a case had been made after lengthy hearings upon the question of a preliminary injunction, it was held to be error to grant a motion for summary judgment on the basis of those findings. *Progress Development Corporation* v. *Mitchell,* (C.A. 7th, 1961) 286 F.2d. 222, 231, 234.

Counsel for the Division of Urban Renewal in effect argues that what was done here by the Supreme Judicial Court could properly be done by a Federal Court on a motion brought under Rule 12(c). (Brief, p. 7.) Counsel has overlooked the fact that such a motion cannot be made until the pleadings are closed.

The constitutional deprivation in this case, the denial in toto of a hearing, is of far greater moment than the error corrected by this court in *Saunders* v. *Shaw,* 244 U. S. 317, where appellant had been precluded from putting a part of the evidence. In that case this court gave relief though it was strongly argued that a remand would be a *"mere concession to technicality."* Recognizing the force of that argument this court said

> "... It may turn out so, but we do not see in the record an absolute warrant for the assumption and therefore cannot be sure that the defendant's rights are protected without giving him a chance to put his evidence in." (344 U. S. 317, 319.)

The present record strongly indicates that a remand in this case, far from being a "mere concession to technicality," will give the plaintiffs the hearing to which they are constitutionally entitled, in a case of weight and substance. No one has a right to assume or suggest that the result of that hearing will necessarily be in favor of defendants. We are bound, on the contrary, to assume that every Massachusetts judge before whom the case may come on remand, will be as open to conviction, either way, as the two judges who dissented below:

> ". . . We are limited to the actual allegations of the bill. The Authority and the bank have chosen to stand on their demurrers and thereby admit those allegations. That there may be facts which justify the taking of the plaintiffs' building for the Project is beside the point. If there be such facts they are not before us in any form. There is no answer; there is no denial. There is no fact of which judicial notice may be taken which compels a determination that the taking was legal. The Authority and the bank should be held to the consequences of their pleadings and be required to go to trial as would any other litigant." (Pet., App. A, pp. 32-33)

Conclusion

For the reasons above considered the writ of certiorari should issue.

Respectfully submitted,

JAMES W. KELLEHER
Counsel for Petitioners

Of Counsel:
WILLIAM C. MADDEN
EDGAR L. KELLEY